



2004

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31 J.C. & U.L. 79-142

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THE THREAT TO CONSTITUTIONAL ACADEMIC FREEDOM

J. PETER BYRNE*

Since the late 1980s, the academic authority of colleges and universities has been subjected to continuing blasts of criticism. Culture warriors portray decayed institutions where sixties radicals have seized control and terrorize students and the few remaining honest faculty with demands for political conformity or bewilder them with incomprehensible theorizing. Some valid criticisms by these writers can be gleaned among their towering hyperbole and tendentious accusations. But the overall effect has been to paint for the broader public an alarming, misleading picture of intolerance and cant. The prevalence of this picture, however false it may be, imperils the constitutional autonomy of colleges and universities protected by the First Amendment. This article argues that increased judicial distrust of academic decision making, operating within a vague and confusing doctrinal framework, imperils the vitality of constitutional academic freedom. It seeks to analyze this threat and vindicate the constitutional propriety of judicial deference to internal academic decision making on matters related to core academic values.

The interpretation of academic freedom as a constitutional right in judicial opinions remains frustratingly uncertain and paradoxical. After a period of creative ambiguity and slow movement toward a workable equilibrium, judicial interpretations of constitutional academic freedom in the past decade seemed to be sliding toward a dangerous distrust of academic decision making. An alarming series of decisions invoked academic freedom without regard to its historical development or informing academic values, ignored it when it plainly directed leaving colleges and universities alone, or put it on doctrinal skids that threatened to whisk it into obscurity. What unifies these decisions, otherwise an uncouth mishmash, is that they enhance the power of judges to set basic policies for colleges and universities. Yet, the recent decision of the Supreme Court in *Grutter v. Bollinger*,¹ upholding the University of Michigan Law School's use of race in admissions, represents a startling counter to this trend, prompting here a critical examination of how seriously we may take the *Grutter* court's reliance on academic freedom in that important opinion. Confusion reigns.

The depth of confusion and threat of descent may be illustrated by another

* Professor of Law, Georgetown University Law Center. I am grateful for helpful comments from David Luban, Robin West, and Robert Post, and from participants at workshops at the Georgetown University Law Center and at the Committee on Politics, Philosophy, and Public Policy, University of Maryland. Thanks for helpful research assistance go to Lee Berger, Tonya Mitchell, and Jeff Johnson.

1. 539 U.S. 306 (2003).

contemporary decision, containing opinions by two intelligent and experienced judges, earnestly trying to do the right thing. *Vega v. Miller*² involved a First Amendment challenge by an untenured professor to his dismissal for professional incompetence. Professor Vega, who apparently had an "at will" contract, taught a composition class for entering freshmen at the New York Maritime Academy.³ In one class, he used a "clustering" exercise in which the students briskly called out words related to a topic; the students chose sex as the topic.⁴ After a genteel start, the students soon were calling out strikingly vulgar expressions, some of which I remember from my youth, others I had never heard before. No one complained.⁵ But the school found out about the session in a roundabout way and promptly notified Professor Vega it would not reappoint him for the upcoming year, expressly relying on the inappropriateness of the clustering exercise and noting that it could expose the school to liability for sexual harassment.⁶

Vega's lawsuit eventually came to the Second Circuit on appeal from the trial court's denial of a summary judgment for the individual administrator defendants, who had claimed qualified immunity for their decision.⁷ The court of appeals reversed in a decision by Judge Newman; Judge Cabranes dissented.⁸ Judge Newman described the case as one in which:

a college teacher has been disciplined for permitting a classroom exercise, initiated for legitimate purposes, to continue to the point and beyond where students are calling out a series of vulgar, sexually explicit words and phrases, many of which the professor writes on the blackboard, either in words or with initials.⁹

The court found that the administrators' decision to terminate was "objectively reasonable" because in 1994, "the available authorities did not settle with certainty the extent to which a college professor could be disciplined for permitting student speech in a classroom to exceed reasonable bounds of discourse."¹⁰ The court relied primarily on a case upholding the dismissal of a tenth grade mathematics teacher for including photographs of bare breasted women in a film clip designed to illustrate "persistence of vision."¹¹ The court expressly did not decide whether Professor Vega's academic freedom had been violated, because the finding of qualified immunity resulted in the dismissal of the complaint against all the defendants.¹²

2. 273 F.3d 460 (2d Cir. 2001).

3. *Id.* at 462.

4. *Id.* at 463.

5. *Id.*

6. *Id.*

7. *Id.* at 462.

8. *Id.* at 460.

9. *Id.* at 467.

10. *Id.* State officials enjoy qualified immunity from civil liability if their behavior was "objectively reasonable," meaning that the unconstitutionality of their behavior was not "clearly established at the time an action occurred." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

11. *Vega*, 273 F.3d at 468 (quoting *Silano v. Sag Harbor Union Free Sch. Dist. Bd.*, 42 F.3d 719 (2d Cir. 1994)).

12. *Id.* at 462.

Judge Cabranes, in dissent, argued that the administrators fired Vega based on an unconstitutionally vague sexual harassment policy and that their actions were objectively unreasonable.¹³ “A college teacher’s First Amendment right to academic freedom in the classroom was clearly established at the time of Vega’s dismissal and Vega’s actions were clearly within that right.”¹⁴ Judge Cabranes punctuated his dissent with strong claims about the importance of academic freedom and the need for judicial protection of it. Citing two non-legal books purporting to document pervasive intolerance and political oppression on college and university campuses,¹⁵ Judge Cabranes even asserted, “The need to protect academic freedom on our college campuses is especially evident in the account of the disheartening developments in the recent past”¹⁶ He embellished the importance of the case:

Today the loser is a college teacher in a conservative academic setting who used an “alternative” teaching technique with profane effect. In the future, the major losers are likely to be “traditionalist” and unconventional college teachers, whose method or speech is found offensive by those who usually dominate our institutions of higher education. The First Amendment, with its “special concern” for academic freedom . . . must protect all college teachers, especially in the performance of their most important duty—teaching in the classroom.¹⁷

There are many aspects of this case that cry out for discussion. First, the majority’s conclusion relies on the pervasive ambiguity of what academic freedom protects to exonerate the defendants. If the classroom is the center of teachers’ work, how can the extent to which they can be disciplined for prompting or permitting students to speak vulgarly be unclear? If that is not settled, what is? In fact, most courts hold that academic freedom does not protect an individual’s teaching methods from disapproval by school administrators.¹⁸

Second, the administrators had the contractual authority to terminate untenured professors they believed in their professional judgment to be ineffective. What precisely about the decision here was questionable on either substantive or procedural grounds? Judge Newman decided the case on the narrower ground of

13. *Id.* at 473.

14. *Id.* at 480.

15. ALAN CHARLES KORS & HARVEY A. SILVERGLATE, *THE SHADOW UNIVERSITY* (1998); DAVID BROMWICH, *POLITICS BY OTHER MEANS* (1992). It is startling that a judge with extensive trial experience would accept these highly charged and partisan indictments as establishing “the politicization of higher education.” *Vega*, 273 F.3d at 472. I take up the nature and consequence of such books in Part III.

16. *Vega*, 273 F.3d at 472.

17. *Id.* at 471–72.

18. See *Carley v. Ariz. Bd. of Regents*, 737 P.2d 1099 (Ariz. Ct. App. 1987) and cases cited therein. Courts disagree whether the boundaries of a professor’s free speech rights are sufficiently clear to deny administrators qualified immunity. Compare *Cohen v. San Bernardino Valley Coll.*, 92 F.3d 968, 970 (9th Cir. 1996) (holding that boundaries are too unclear), with *Hardy v. Jefferson Cmty. Coll.*, 260 F.3d 671, 682–83 (6th Cir. 2001) (holding that boundaries are sufficiently clear).

immunity, probably to save the administrators from trial on the merits, but it leaves one wondering whether their decision was primarily an academic evaluation or whether they were suppressing free talk about sex for ideological reasons or from fear about litigation. Judge Cabranes apparently believes that constitutional academic freedom of the professor trumps the contractual rights of the administrators.

Third, the case presents fundamental issues about how active a role the judiciary should play in policing such decisions by administrators to ensure classroom freedom and to settle such questions as the bounds of decorum in a classroom. The traditional legal means for insulating a professor from such oversight is tenure, and academic freedom cannot be protected systematically without contractual job security and specifications about the nature and process for professional evaluations, all quite lacking in this case but exciting no judicial comment. Judge Cabranes justified judicial control by reference to the supposed threat to freedom on campuses, but how real is this threat either generally or in the case under review?

Finally, one must note that the case does not involve any obviously serious intellectual issue, for example, some professor defending the views of Islamic fundamentalists or the morality of some unpopular sexual practice. We are dealing with a classroom exercise for pre-freshmen that turned raw, some doubtful judgment by a teacher, and a decision by administrators that might seem precipitous. The case hardly threatened to "impose a straightjacket upon the intellectual leaders in our colleges,"¹⁹ as Judge Cabranes claimed, quoting from a case in which such a threat really was present.²⁰ But the inability to settle such ordinary matters in a court of appeals promises endless future litigation.

Vega v. Miller well captures the confusion surrounding judicial forays at constitutional academic freedom, and the dissent typifies the trend of decisions justifying greater judicial intrusion into academic decision making on the grounds that colleges and universities are places rife with intolerance, although needing maximum individual liberty. This article seeks to clarify and explain this trend. I describe and critique several cases decided during and after the 1990s, involving the application of the First Amendment to disputes concerning colleges and universities. Although these cases include several different types of disputes, I argue that they can best be understood as a group, highlighting the need for a general theory of the place of colleges and universities within the constitutional order. In the course of this analysis, I apply and expand certain approaches that I have explained in prior articles concerning academic freedom and student free speech.²¹ While these approaches do not now amount to a comprehensive theory

19. *Vega*, 273 F.3d at 474.

20. *Id.* (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (holding unconstitutional interrogation by state attorney general of university lecturer about the political content of classroom lecture)).

21. See, e.g., J. Peter Byrne, *Academic Freedom, A "Special Concern of the First Amendment,"* 99 YALE L.J. 251 (1989) [hereinafter Byrne, *Special Concern*]; J. Peter Byrne, *Academic Freedom of Part-Time Faculty*, 27 J.C. & U.L. 583 (2001) [hereinafter Byrne, *Part-Time Faculty*]; J. Peter Byrne, *Constitutional Academic Freedom in Scholarship and in Court*, CHRON. HIGHER EDUC., January 5, 2001, at B13 [hereinafter Byrne, *Scholarship and Court*].

of the constitutional place of higher education, they may be building blocks of such a theory.

Part I reviews the concept of academic freedom and its development as an academic norm and later uncertain acceptance as a constitutional interest protected by the First Amendment. I claim here that by about 1990, something like a scholarly consensus emerged that emphasized that constitutional academic freedom protected the “intellectual life of a university” from outside political interference, that this protection extended to institutional decision making on academic grounds, and that this institutional interest qualified whatever individual speech rights any member of the academic community might have against college and university officials. The breadth and importance of this consensus will also be examined.

Part II addresses subsequent judicial decisions that depart from this consensus. Here I group these cases into four categories shaped by the recurring factual patterns or specific doctrinal developments they involve. These are a) cranky professors; b) vulgar students; c) absorption of academic freedom into the doctrine of government speech; and d) affirmative action. I argue that these cases taken as a whole threaten the demise of academic freedom as a constitutional right with its own speech values and coherence, with serious consequences for higher education. At the end, I consider whether *Grutter* likely will change the course of interpretation for the better.

Part III attempts to suggest some reasons why recent cases have taken the directions they have. Here it becomes necessary to offer some observations on both intellectual and demographic changes within higher education. My claim here will be that these changes argue for continuing judicial protection of colleges and universities from outside interference, and principled judicial restraint from deciding academic disputes. Finally, I suggest some concrete steps that supporters of higher education should take to defend intellectual autonomy and establish a new consensus about the role of colleges and universities within the constitutional structure.

I. THE EMERGENCE OF CONSTITUTIONAL ACADEMIC FREEDOM

Academic freedom developed as an ethical and organizational principle before it had any legal significance.²² The classic statement by the American Association of University Professors (“AAUP”), the 1915 General Declaration of Principles,²³ reasoned from the role of the professor in the emerging research universities as a scholar seeking truth according to the lights of modern scholarly disciplines,²⁴ a teacher of nearly mature students,²⁵ and an independent expert offering guidance to the public.²⁶ It declared that freedom for faculty in research, publication, and

22. This section draws on Byrne, *Special Concern*, *supra* note 21.

23. 1915 General Declaration of Principles, 1 AAUP BULL. 17 (1915), *reprinted as* App. A, *General Report of the Committee on Academic Freedom and Academic Tenure* in 53 LAW & CONTEMP. PROBS. 393 app. A (1990) [hereinafter 1915 Declaration].

24. *See* 1915 Declaration, *supra* note 23 at 401.

25. *Id.* at 402–03.

26. *Id.* at 396.

teaching was essential for progress in knowledge.²⁷ Accordingly, ideologically tainted personnel moves mandated by university trustees or by politicians threatened the basic function of higher education itself.

The 1915 Declaration sought to achieve this professional autonomy through nurturing respect for the guiding norms and by the structural devices of peer review and tenure.²⁸ Peer review specifies that evaluation of a faculty member be only of his professional competence as a scholar and teacher without regard to the political tendencies of his work.²⁹ Moreover, the evaluation should be performed by other professors within his field competent to evaluate his work. Although legally the lay board and its appointed administrators contract for the university, they should normally defer to judgments made by faculty acting in schools and departments.

Tenure provides faculty who have earned it the presumption of professional competence and continued employment.³⁰ A tenure system presupposes extensive efforts to evaluate the professional work of junior faculty culminating in a tenure review involving inside and outside evaluators of writings, classroom visits, and votes by tenure committees and faculties with reviews by deans and other academic administrators. After tenure is awarded, the professor can be dismissed only for cause shown in a hearing in which the college or university bears some burden of proof. Thus tenure effectively protects the academic freedom of the tenured by creating barriers to dismissal and exposing the reasons behind dismissal to ensure that they are not improper. It has other good and bad consequences for higher education that have rendered it controversial, particularly in periods of economic stringency and for institutions seeking to change direction, but its role as a shield for academic freedom has kept it remarkably intact for nearly a century.³¹

The AAUP was strikingly successful in achieving acceptance of its approach to academic freedom and tenure among research institutions. By 1940, all the major organizations of universities and administrators joined with the AAUP in agreeing to a *Statement of Principles on Academic Freedom and Tenure* ("Statement").³² This *Statement* made the AAUP approach the standard for the relations between institutions and faculty. With minor changes, it has endured for more than sixty years, while American higher education has grown in scope and scale to an extent unimaginable to the drafters.³³ Most small colleges and religiously affiliated institutions that initially resisted the *Statement* eventually embraced it as the gold

27. *Id.* at 396–97.

28. *Id.* at 405–06.

29. *Id.* at 404–05.

30. See J. Peter Byrne, *Academic Freedom Without Tenure?* (American Association for Higher Education, New Pathways Working Paper No. 5, 1997).

31. An important recent study examines how, and evaluates how well, tenure operates in many different circumstances. *THE QUESTIONS OF TENURE* (Richard P. Chait, ed., 2002).

32. AAUP, *1940 Statement of Principles on Academic Freedom and Tenure With 1970 Interpretive Comments*, in *POLICY DOCUMENTS & REPORTS* (9th ed. 2001), available at <http://www.aaup.org/statements/Redbook/1940stat.htm>.

33. See Walter P. Metzger, *The 1940 Statement of Principles on Academic Freedom and Tenure*, 53 *LAW & CONTEMP. PROBS.* 3, 3–4 (1990).

standard of higher education, although not without criticism and complexity.³⁴ At the same time, the AAUP continued to specify and apply the Statement through investigations of complaints by aggrieved faculty, issuing reports on violations, and maintaining a censure list of offending institutions on which no mainstream college or university wishes to appear.³⁵ The success of the AAUP paralleled the success of the American model of higher education in which faculty are expected to pursue research and publication, as well as teach and manage the academic standards for the institution, and individual schools compete for faculty, students, research grants, and philanthropy.

It is essential to note that while the system of academic freedom protects the professional autonomy of the individual professor, it does so primarily within the conventions of the scholarly community. A junior professor must master the field as defined by her seniors to be approved, although mastery may involve persuasive modifications of disciplinary assumptions. Negative evaluations on professional grounds are as necessary for this system as is respiration for the body; without such collective rejections, disciplines would lose coherence and academia's claims to advance knowledge would suffer. Even after tenure, peer pressure and interstitial management (such as raises determined by a dean or class assignments approved by a department chair) push toward professional standards.

No one claims that this system operates perfectly in every instance. Without doubt, faculties sometime award or deny tenure based on extraneous grounds or are reversed by administrators without justification. Moreover, senescence may claim tenured faculty within institutions unwilling to insist on standards. Notably, the efforts of the AAUP have focused more on promoting institutional adoption of procedures for avoiding or resolving such claims, rather than in adjudicating individual complaints. Thus, a school on the censure list may be removed by adopting recommended procedures for the future rather than by retaining the complainant.³⁶ While this certainly stems from the limited resources of the AAUP, it also reflects the understanding that academic freedom and tenure are instrumental rights justified by their contribution to knowledge, education, and the public good rather than by an inherent right of the individual.

Law played no positive role in the development or initial enforcement of academic freedom. The principles and procedures were developed by academics, adopting German practice, for internal governance and to make up for the lack of authority or protection extended to faculty by law.³⁷ Professors in the early twentieth century were typically employed either at-will or on short-term contracts, thus subject to dismissal or non-renewal for no reason at all.³⁸ By 1940,

34. *Id.*

35. See AAUP, *Developments Relating to Censure by the Association*, at <http://www.aaup.org/Com-a/devcen.htm> (last visited Oct. 12, 2004) for a current list of censored institutions.

36. See AAUP, *What is Censure?*, at <http://www.aaup.org/Com-a/prcenback.htm> (Mar. 7, 2002).

37. See LAURENCE R. VEYSEY, *THE EMERGENCE OF THE AMERICAN UNIVERSITY* 384-418 (1965); WALTER P. METZGER, *ACADEMIC FREEDOM IN THE AGE OF THE UNIVERSITY* 93-138 (1961).

38. Without tenure or some other form of long-term contract, protecting academic freedom

employment contracts could either expressly guarantee a professor academic freedom or incorporate the protections of tenure, making these principles legally enforceable as contract rights in individual cases.³⁹

The first appearance of the words "academic freedom" in a reported judicial opinion was hardly auspicious. Upon petition of a parent, a New York judge in 1940 ordered City College not to employ Bertrand Russell as a professor because of his bad moral character, evidenced by his writings on sex.⁴⁰ The judge defended this high-handed order against the college's claim that it violated academic freedom by stating:

Academic freedom does not mean academic license. It is the freedom to do good and not to teach evil. . . . Academic freedom cannot teach that abduction is lawful nor that adultery is attractive and good for the community. There are norms and criteria of truth which have been recognized by the founding fathers.⁴¹

This decision should remind us that judges are as capable of interpreting academic freedom to embody popular or civil values, rather than academic norms, as are trustees or legislators.

The Supreme Court first incorporated academic freedom into the First Amendment beginning in the 1950s in response to popular concerns about "loyalty" of faculty members. But the Court's invocation of academic freedom was not accompanied by precise legal definition of the term nor reasoned justification of its place within the First Amendment. The opinions invoked academic freedom in rhetorical flourishes, while invalidating political investigations or loyalty oaths on other grounds. Moreover, although the opinions affirmed the values of free inquiry that animate the AAUP approach, they described the rights at stake more as those of the colleges and universities than of the individual faculty members. While the facts of the cases may have encouraged this, as they involved outside political intrusions in which the teacher and the school were united, the Court's description of institutional rights both drew on a long indigenous legal tradition and had significant legal consequences.

The first and most significant case was *Sweezy v. New Hampshire*,⁴² which held on obscure grounds that the attorney general of New Hampshire could not question a guest lecturer about the political content of remarks given in a political science class at the University of New Hampshire.⁴³ The Court's fullest statement about academic freedom was given in a paragraph:

The essentiality of freedom in the community of American universities

at reasonable cost is difficult. See Byrne, *Part-Time Faculty*, *supra* note 21, at 584.

39. See WILLIAM A. KAPLIN & BARBARA A. LEE, *THE LAW OF HIGHER EDUCATION* 150–54 (discussing the enforceability of academic freedom norms incorporated into faculty contracts).

40. *Kay v. Bd. of Higher Ed.*, 18 N.Y.S.2d 821, 831 (N.Y. Sup. Ct. 1940). For a general discussion of the case see THOM WEIDLICH, *APPOINTMENT DENIED: THE INQUISITION OF BERTRAND RUSSELL* (2000) and *THE BERTRAND RUSSELL CASE* (John Dewey & Horace M. Kallen eds., 1941).

41. *Kay*, 18 N.Y.S.2d at 829.

42. 354 U.S. 234 (1957).

43. *Id.* at 254–55.

is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot be made. Particularly is that true of the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study, and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.⁴⁴

Chief Justice Warren's classic statement energetically unites the values of democratic self-government with those of knowledge and criticism.⁴⁵ Yet it does not indicate who holds the right, nor how it should be balanced.

Justice Frankfurter's influential concurring opinion rested on the same values, but more emphatically located the right in the institution itself, finding that it required "the exclusion of governmental intervention in the intellectual life of a university."⁴⁶ He went on to quote an academic statement from South Africa, which specified "'the four essential freedoms' of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study."⁴⁷ Neither opinion made any reference to the AAUP or the principles of academic freedom it had established. Several subsequent opinions added to the store of rhetorical encomiums for academic freedom, but little to doctrinal elaboration.⁴⁸

The Court's early emphasis on the rights of the institution itself as the creator of the conditions for free scholarship and teaching took on additional weight from Justice Powell's invocation of it in his concurring opinion in *Regents of the University of California v. Bakke*.⁴⁹ Although agreeing with the plurality that the affirmative action admissions plan under review violated the Equal Protection Clause, Justice Powell argued that admissions decisions that treated ethnicity as one factor among many could be sustained.⁵⁰ Crucially, he based this conclusion on the academic freedom of a university "to determine for itself on academic grounds . . . who may be taught," as described by Justice Frankfurter in *Sweezy*.⁵¹ Thus, the weight of the university's First Amendment right could counterbalance the Equal Protection right of a white applicant to be considered without regard to

44. *Id.* at 250.

45. David M. Rabban, *A Functional Analysis of "Individual" and "Institutional" Academic Freedom Under the First Amendment*, 53 LAW & CONTEMP. PROBS. 227, 240 (1990).

46. *Sweezy*, 354 U.S. at 262 (Frankfurter, J., concurring).

47. *Id.* (internal citations omitted).

48. In particular, *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967), established that academic freedom justifies judicial use of the overbreadth and vagueness doctrines to strike down statutes. It also described the classroom as "peculiarly the marketplace of ideas," setting off much speculation about what that means. *Id.*

49. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978).

50. *Id.* at 312.

51. *Id.* See *supra*, text accompanying notes 42–47.

race.⁵² *Bakke* set the method for considering institutional academic freedom in a constitutional case: the Court would defer to the university only insofar as it was persuaded that the university was acting on academic, rather than political, grounds.⁵³ Justice Stevens subsequently followed suit in his important concurring opinion in *Widmar v. Vincent*,⁵⁴ citing *Bakke* for the "academic freedom of public universities," and arguing that educational decisions affecting speech generally "should be made by academicians, not by federal judges."⁵⁵ Finally, the Court unanimously rejected a student's challenge to academic dismissal, invoking a university's constitutional interest in making its own educational decisions.⁵⁶ Thus, by the late 1980s, substantial momentum carried the view that academic freedom protected college and university decision making concerning academic matters from political interference. But during the same period, courts had established that public universities were "state actors" against whom the individual constitutional rights of faculty and students could be enforced.⁵⁷ Would academic freedom inhibit courts from enforcing the First Amendment or other rights of members of the academic community against the institutions?

The courts by now had been elaborating constitutional rights of faculty and students enforceable against state schools for some time. Many of these stem from the civil rights and anti-war movements, which established that institutions themselves, as state actors, can violate the rights of their members.⁵⁸ The Supreme Court extended this to student First Amendment rights against college and university authorities similar to any citizen's rights against the police, although it affirmed the authority of college and university officials to protect an educational mission, for example, to bar student organizations that "infringe reasonable campus rules, interrupt classes, or substantially interfere with the opportunity of other students to obtain an education."⁵⁹ In the 60s and 70s, these distinctions were pushed to extremes and federal judges had many occasions to attempt to sort out student rights from reasonable campus rules.⁶⁰ At the same time, the Court began

52. *Bakke*, 438 U.S. at 312-13.

53. *Id.* at 312.

54. 454 U.S. 263 (1981).

55. *Id.* at 278-79.

56. *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 227 (1985).

57. State universities would seem to fall within the test for public entities set out in *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 400 (1995) ("We hold that where, as here, the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for purposes of the First Amendment.").

58. The paradox of the state action doctrine for higher education is that it treats diametrically differently state and private schools that otherwise resemble each other more than not, assimilating the former to standards developed for the state itself while leaving the latter free from constitutional restraint. See Byrne, *Special Concern*, *supra* note 21, at 299-300. The AAUP's academic freedom has always applied to both equally. Moreover, the Court has consistently recognized institutional freedom of state universities from state government interference.

59. *Healy v. James*, 408 U.S. 169, 189 (1972).

60. J. Peter Byrne, *Racial Insults and Free Speech Within the University*, 79 GEO. L.J. 399, 428-40 (1991).

to protect public employees, including teachers, from dismissal for exercise of First Amendment rights to speak on matters of public concern.⁶¹ Finally, some lower courts seemed to protect individual professors from institutional punishments for the political tendencies of their academic work as a matter of individual academic freedom protected by the First Amendment.⁶²

By now, courts and scholars began to see conflict between individual and institutional conceptions of constitutional academic freedom. The Supreme Court stated, "Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students . . . but also, and somewhat inconsistently, on autonomous decision making by the academy itself."⁶³ Judge Posner observed that academic freedom denotes "both the freedom of the academy to pursue its ends without interference from the government . . . and the freedom of the individual teacher . . . to pursue his ends without interference from the academy; and these two freedoms are in conflict, as in this case."⁶⁴ Several distinguished scholars began to explore the origins and nature of the distinction between individual and institutional academic freedom.⁶⁵

In 1989, I wrote an article to explain the confusion and justify priority for institutional rights in constitutional academic freedom.⁶⁶ In the course of a comprehensive account, I made several general arguments. First, institutional academic freedom stands on a legal foundation reaching back to the origins of the European university in the middle ages, which was preserved in the United States in the nineteenth century through the common law doctrine of academic abstention and through state constitutional provisions.⁶⁷ Second, the non-legal tradition of academic freedom requires colleges and universities to evaluate the speech of faculty members on academic grounds, and federal judges will have trouble distinguishing among valid academic and invalid ideological grounds in intramural disputes.⁶⁸ Third, judicial imposition of the values of the First Amendment to resolve such disputes cannot be justified any more than would imposition of

61. See, e.g., *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968).

62. See, e.g., *Ollman v. Toll*, 518 F. Supp. 1196, 1202 (D. Md. 1981) (stating that expression of political beliefs is entitled to full First Amendment protection); *Cooper v. Ross*, 472 F. Supp. 802, 813–14 (E.D. Ark. 1979) (discussing First Amendment protection of professor's beliefs stated in an academic book review).

63. *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 n.12 (1985). The Court immediately quoted the four freedoms and cited *Bakke*. *Id.* at 227 (citing *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978)). The case involved a substantive due process challenge to an academic dismissal from a medical school, which the Court rejected, holding that its task was limited to determining whether the decision "was such a substantial departure from accepted academic norms as to demonstrate that the faculty did not exercise professional judgment." *Id.* at 227. See also *Bd. of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78 (1978) (holding that student who was fully informed of faculty's dissatisfaction with her progress was accorded procedural due process despite lack of formal hearing).

64. *Piarowski v. Ill. Cmty. Coll. Dist.* 515, 759 F.2d 625, 629 (7th Cir. 1985).

65. See, e.g., Mark Yudof, *Three Faces of Academic Freedom*, 32 LOY. L. REV. 831 (1987); Walter Metzger, *Profession and Constitution: Two Definitions of Academic Freedom in America*, 66 TEX. L. REV. 1265 (1988).

66. See Byrne, *Special Concern*, *supra* note 21.

67. *Id.* at 321–22.

68. *Id.* at 326.

loyalty or sexual probity norms by a legislature; both displace academic norms and threaten the communal provision of knowledge.⁶⁹ The First Amendment generally stands on the foundation that government officials can never be the judge of the value of a citizen's speech, but academic freedom requires that faculty peers and appropriate academic administrators judge on academic grounds the value of an individual's scholarship and teaching.⁷⁰ Accordingly, courts can play a more constructive role in protecting from political interference those colleges and universities which themselves provide the structures for, and protect the practice of, free teaching and scholarship.⁷¹ I have acknowledged that judicial enforcement of an individual right of academic freedom could be warranted in a flagrant case of ideological prejudice.

In response, Professor David Rabban wrote an article taking issue with my proposal that judges generally stay out of speech-related disputes between professors and institutions.⁷² Drawing on his first-hand experience litigating for the AAUP and his unsurpassed knowledge of the history of the First Amendment, Professor Rabban argued that courts had made a good start in fashioning an individual right of academic freedom that fit within the First Amendment and respected the institutional context of higher education.⁷³ He did "generally agree with Byrne that judges should not review good faith debates within universities about the merits of unpopular or unconventional ideas."⁷⁴ Nonetheless, he cited judicial experience in managing Title VII cases to support his view that courts could separate pretextual invocations of academic needs from real disputes.⁷⁵ He concluded:

The most important response to Byrne is that judges can enforce the academic freedom of individual professors against administrators, trustees, and faculty peers, without violating a legitimate conception of institutional academic freedom or abandoning appropriate judicial deference to academic decision-making. The judiciary is more deliberative and less political than either the legislature or the executive.⁷⁶

Both then and now I observe the narrowness of the difference between our views. It might be said that I favor a constitutional emphasis on an institutional

69. *Id.* at 307–08.

70. *Id.* at 308–09.

71. *Id.* at 281–94. Obviously, universities are subject to a broad array of legislative and constitutional duties in order to safeguard basic public policy. In Byrne, *Special Concern*, *supra* note 21, at 330, I discuss standards for assessing when government regulation invades institutional academic freedom, essentially elaborating on what counts as "academic grounds" in the language of *Sweezy*.

72. Rabban, *supra* note 45.

73. *Id.* at 252–55.

74. *Id.* at 283.

75. *Id.* at 264–65. This is a valid point as deference in interpreting academic standards is relevant in each case. But I think the crucial difference is that judges understand discrimination and have jurisdiction to explore its implications but do not understand academic freedom and will tend to substitute generic First Amendment concepts in its place.

76. *Id.* at 286–87.

right normatively dependent on the institution's respecting individual rights, while Professor Rabban favors an individual right sensitive to the role of the institution in safeguarding the scholarly and educational context. Both of us recognize that constitutional academic freedom exists to preserve professionally informed teaching and scholarship from political and ideological interference, primarily but not exclusively by non-academics; neither of us believes that judges can be relied on to resolve close intramural cases without risking displacement of fundamental academic values. The disagreement lay in the extent to which judges can be trusted, particularly with regard to academic administrators.⁷⁷ This remains a legitimate question about which people may disagree. Decisions since 1990 have not brightened my assessment of the capacity of courts to accord respect to academic values.

Perhaps it is too much to say that there was a consensus among courts and commentators in 1990 about what was known and what was at issue concerning constitutional academic freedom. But the trend of judicial decisions and the concerns of various scholars did seem to converge upon a variety of concerns about how to balance competing values and best preserve the traditional excellence of our system of higher education, should some social movement emerge to threaten it. The events of the past decade make such convergence appear antediluvian, making the disagreements among scholars appear as minor irritants in a golden era of peace. For in the past decade or so, judicial and other constitutional decisions have threatened the continued vitality of constitutional academic freedom.

II. CONSTITUTIONAL ACADEMIC FREEDOM IN OUR TIME

In this section, I want to examine and critique what I take to be the leading cases on constitutional academic freedom over the last decade or so. These cases reflect new attempts by schools to protect students from racial insults and sexual harassment, the sharp critique of "political correctness," continued conflict over affirmative action in student admissions, and the evolution of new constitutional doctrines. I divide the cases into four categories to facilitate consideration: 1) professors' speech; 2) student speech; 3) the relation of the professor to government speech; and 4) affirmative action as an instance of academic policymaking. This order allows me to address the significance of *Grutter v.*

77. There may be a jurisprudential disagreement as well. What should be the source of the content of the First Amendment? Professor Rabban sees courts elaborating individual academic freedom by interpreting the inherited doctrine of free speech in the context of higher education. *Id.* at 287. I want courts to preserve the system of free expression within the college or university as they have found it. Rather than employing a liberal universalist premise in my interpretation of academic freedom, I work from a broadly Burkean defense of the indigenous speech norms of the university, which I view as paidic or jurigenerative in the sense used by Professor Robert Cover. Robert Cover, *Forward: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983). In other words, I do not view academic freedom as a matter of courts imposing civil notions of liberty on a state institution (i.e., the public university), as much as deference to and even protection of the autonomous normative world of academic speech. The Constitution does not create the speech norms of academic freedom; they have been created by the values and practical needs of organized scholarship and advanced teaching.

Bollinger both for academic policymaking and as the most recent important academic freedom decision.

A. Professors Disciplined for Offensive Speech

No act implicates academic freedom more directly than the disciplining of a professor for expression in the classroom or in scholarship. In this section, I discuss reported cases where academic administrators penalized a teacher for speech. Thus, we are not here considering easy cases like an attorney general questioning a lecturer about the political content of his speech, where all agree that constitutional academic freedom provides legal protection either to the professor or his institution. This is plainly an area where academic freedom as an educational norm should constrain the behavior of academic administrators, whether or not there may be any legal consequences. Finally, it is the area where Professor Rabban's and my approach to constitutional academic freedom diverge most clearly. He views judges as able effectively to protect individual academic freedom in all cases save where they reflect disagreement about academic principles,⁷⁸ while I think them incompetent to give content to academic freedom in all but the most blatant forms of ideological exclusion.

Let us begin with a case where I agree that the court was justified in protecting a controversial professor. Still, the timing and manner of the court's analysis engenders concern about its role. Michael Levin was a tenured Professor in the Department of Philosophy at the City College of New York ("CCNY").⁷⁹ Between 1987 and 1989, he published pieces arguing that affirmative action was misguided because the disparity in academic performance between blacks and whites was caused by the lower intelligence of blacks and could not be remedied.⁸⁰ Students protested and the Faculty Senate condemned Levin's views, while affirming his right to express them without constraint.⁸¹ In the spring semester of 1990, the dean of the college, reacting to Levin's third publication, arranged an alternate section of Levin's Philosophy 101 class and invited students enrolled in the class to transfer.⁸² Subsequently, the president of CCNY denounced Levin's views in a press conference and organized an "Ad Hoc Committee on Academic Rights and Responsibilities" to assess whether Levin's writings exceeded the bounds of academic freedom and amounted to conduct meriting sanction.⁸³ Levin filed suit alleging that these actions violated his First Amendment rights.

78. Rabban, *supra* note 45, at 287.

79. *Levin v. Harleston*, 770 F. Supp. 895, 898 (S.D.N.Y. 1991). City College was convulsed at the same time by controversy concerning Leonard Jeffries, who was removed from his post as chair of the Black Studies Department for making anti-Semitic public remarks. Jeffries' suit claiming violation of his First Amendment rights failed because his position as department chair made him an officer of the college whose views could be attributed to the college in a way that no professor's could. *Jeffries v. Harleston*, 52 F.3d 9 (2d Cir. 1995). Academic freedom protects professors, not administrators, although the court never put it in such terms.

80. *Levin*, 770 F. Supp. at 899-903.

81. *Id.* at 903-09.

82. *Id.* at 907.

83. *Id.* at 911-12.

In an angry opinion, Judge Conboy found that the college administrators violated Professor Levin's First Amendment rights and enjoined the provision of alternate classes and any disciplinary action against him based solely on his expression of ideas.⁸⁴ Crucially, the court found as a fact that the administrators had created the sections and constituted the committee purposefully to officially condemn his views, stigmatize him, and encourage students to abandon his class.⁸⁵ The court also found that the actions taken were intended to, and did, chill Professor Levin in expressing his views.⁸⁶ These findings were upheld on appeal, although the remedy was moderated.⁸⁷

The trial court's conclusion in *Levin* seems to protect appropriately individual academic freedom, because the college administrators intentionally sought to silence a professor through extraordinary administrative means. *Levin* seems to be a case where ideological abhorrence and concern for popular anger drove administrators to discipline a professor indirectly for his views. As such, it falls within that small category of cases where I acknowledge the propriety of judicial protection of individual academic freedom.

Yet the district court opinion in the case is troubling in its sweep, vehemence, and disregard for academic context. Neither the district court nor the court of appeals framed the case as one of constitutional academic freedom, but instead, as one of free speech generally. This invites disregard of appropriate limitations on academic speech. It may be true that Professor Levin's writings raise questions about his professional competence in drawing social and educational conclusions from data about intellectual testing. Colleges and universities do not need to continue to employ professors whose writings clearly exhibit a lack or loss of professional competence. Thus, historians who deny the holocaust or astronomers who claim that the moon is made of green cheese may be dismissed. Some expression, even within one's discipline, can properly prompt disciplinary action. What *Levin* lacked were scrupulously fair procedures addressing the question of professional competence. The ad hoc committee was not constituted by colleagues in Levin's field, it took no evidence, and it did not give Professor Levin an opportunity to answer the charges.⁸⁸

Similarly, the alternate classes were set up before any students requested release from Professor Levin, and no evidence was ever introduced other than that he was a good and fair teacher.⁸⁹ Thus, the court's conclusion that the alternate classes were more an administrative statement than an educational adjustment seems warranted. But what if a professor conveyed to his students in class that he believed that those who were black were less intelligent than those who were white? Surely then academic authorities could provide relief to black students who claimed that they could not learn in such a classroom. It is a closer question

84. *Id.* at 918.

85. *Id.* at 918.

86. *Id.* at 920.

87. The court of appeals granted Levin only declaratory, not injunctive relief. *Levin v. Harleston*, 966 F.2d 85, 90 (2d Cir. 1992).

88. *Levin*, 770 F. Supp. at 923.

89. *Id.* at 915.

whether to accommodate students who discover that their professor has expressed such views outside the classroom and who feel intimidated thereby; forming a committee to consider such a question before deciding seems responsible. But Judge Conboy stated: "Even if the defendants had managed to offer any credible evidence to support their claimed fear that exposure in the campus environment to Professor Levin's views might somehow have caused some students harm, such evidence could have constitutionally been accorded no weight."⁹⁰ In support for that view, he relied on a case involving student extracurricular speech.⁹¹ But any useable notion of academic freedom must distinguish between the effect of a professor's views on his students and political advocacy by a student organization.⁹² The Second Circuit took a somewhat broader view: "Formation of the alternative sections would not be unlawful if done to further a legitimate educational interest that outweighed the infringement on Professor Levin's First Amendment rights."⁹³ The recognition that academic decisions furthering educational objectives deserve constitutional weight is helpful. But I would argue that if the actions were taken in reasonable pursuance of legitimate educational concerns, following appropriate procedures, there would be no infringement of the professor's academic freedom and therefore no infringement of any First Amendment rights.

Did the courts need to intervene? Judge Conboy began his opinion: "This case raises serious constitutional questions that go to the heart of the current national debate on what has come to be denominated as 'political correctness' in speech and thought on the campuses of the nation's colleges and universities."⁹⁴ His quotations from his own belligerent questioning of the college officials and his rhetoric throughout display clearly his contempt for them.⁹⁵ Yet the academic system itself performed reasonably well. Professor Levin was protected by his tenure. He could not be dismissed without proving incompetence or some other cause, and the administrators never even tried. The faculty senate, having condemned Levin's views, as they plainly were entitled to do, staunchly opposed any attempt to remove him.⁹⁶ His department supported his continued teaching.⁹⁷ Even the *ad hoc* committee concluded that no action should be brought against him.⁹⁸ Thus, even in a city polarized by racial tension, at a college serving primarily a minority population, with demagogues on each side, the worst that happened to a proponent of white racial superiority was the stigma of alternate classes and the threat of presidential action. In context, I believe that was enough to justify judicial intervention, but the faculty of City College probably would have

90. *Id.* at 923.

91. The case relied upon, *Gay Alliance of Students v. Matthews*, 544 F.2d 162, 167 (4th Cir. 1976), is one of many finding unconstitutional a state university's unwillingness to treat a gay student organization on par with others.

92. This idea is developed in Byrne, *supra* note 60, at 424-25.

93. *Levin*, 966 F.2d at 88.

94. *Levin*, 770 F. Supp. at 897-98.

95. *See id.* at 904-16.

96. *Id.* at 907.

97. *Levin*, 770 F. Supp. At 908-09.

98. *Levin*, 996 F.2d at 89.

brought the matter to a fair conclusion eventually without judicial involvement. In any event, it is self-righteous to describe them as being in the grip of political correctness.

Fortunately, reported cases in which professors' rights have been so clearly invaded are rare.⁹⁹ The problems with Professor Don Silva at the University of New Hampshire are more typical of the disputes that preoccupied courts during the decade.¹⁰⁰ Moreover, studying the Silva dispute offers the opportunity to compare treatment of the case by a U.S. District Court, the AAUP, and commentators on "political correctness."

Professor Silva was a tenured instructor in a two-year certificate program in applied science at the University of New Hampshire.¹⁰¹ In the spring of 1992, he was teaching a class in technical writing and in one class used sexual metaphors to explain focus in writing.¹⁰² Two days later, he gave an example of a definition: "Belly dancing is like jello on a plate with a vibrator under the plate."¹⁰³ Six female students complained about the two classes, and added concerns about the teacher's frequent use of sexual imagery and recounted several sexually suggestive

99. Indeed, as thoroughgoing a critic of modern academia as Professor Hamilton admits that "while there have been investigations and discipline under harassment and discrimination codes and policies, there appear to be no instances where universities have instituted formal proceedings under a tenure code to penalize a tenured professor for competent academic inquiry or speech that opposes fundamentalist academic left ideology." NEIL HAMILTON, ZEALOTRY AND ACADEMIC FREEDOM: A LEGAL AND HISTORICAL PERSPECTIVE 82 (1995). He condemns the university's action against Silva as a more procedurally limited attack by adherents of that ideology. *Id.* at 82. One recent case where the court's intervention seems manifestly justified is *Hardy v. Jefferson Cmty. Coll.*, 260 F.3d 671 (6th Cir. 2001). Hardy alleged that he taught communications courses at the college for several years, receiving excellent evaluations. *Id.* at 674. In one introductory class, he discussed with students how language was used to oppress social groups and solicited examples; the students gave several, including "nigger" and "bitch." *Id.* at 674. One African-American student complained about the use of those terms (Hardy ironically forbade students from using abusive language in class discussions) both to school authorities and to a local minister who was a civil rights activist. *Id.* The minister also complained, threatening to dissuade students from attending the college, which already suffered from declining enrollment. *Id.* Hardy was soon dismissed, apparently because of the threat. *Id.* The Sixth Circuit upheld the district court's ruling that Hardy's allegations stated a claim. *Id.* The Court essentially found that Hardy was protected by academic freedom, since his use of the terms "was germane to the subject matter, not gratuitously used by Hardy in an abusive manner." *Id.* at 679. While the Court's doctrinal structure for reaching this conclusion is inadequate, its instincts for the range of the limits of institutional autonomy seem sound, because it found that the college did not act from considered academic judgment, but presented "a classic illustration of 'undifferentiated fear' of disturbance" from outside oppression. *Id.* at 682.

100. See *Silva v. Univ. of N.H.*, 888 F. Supp. 293 (D.N.H. 1994).

101. *Id.* at 247.

102. According to Silva's complaint, he said:

I will put focus in terms of sex, so you can better understand it. Focus is like sex. You seek a target. You zero in on your subject. You move from side to side. You close in on the subject. You bracket the subject and center on it. Focus connects experience and language. You and the subject become one.

Id. at 299. It is readily apparent that small variations in the words actually used and accompanying vocal and physical expression could accentuate the affect of such a statement.

103. *Id.*

comments made to them outside of class.¹⁰⁴ A dean promptly again created "shadow" classes for students who wished release from Professor Silva.¹⁰⁵ After informal attempts to settle students' complaints failed, the school reprimanded Silva and then suspended him without pay.¹⁰⁶ When he pursued grievance procedures, the hearing panel and subsequent appeals board, dominated by students, considered the case without precise charges being filed and without clear burdens of proof allocated; both concluded that he had violated the university's sexual harassment policy and agreed that he should be suspended without pay for at least one year and enter counseling at his own expense.¹⁰⁷

Silva filed suit claiming that his First Amendment and due process rights had been violated.¹⁰⁸ Judge Devine granted Silva's motion for a preliminary injunction, finding that the university had violated his First Amendment rights.¹⁰⁹ Bizarrely, he found as a fact that "the belly dancing statement was not 'of a sexual nature.'"¹¹⁰ He also found that the students had mistakenly taken the reference to the vibrator to refer to a sexual device, and that their misunderstanding had led them erroneously to find Silva's statements offensive.¹¹¹ The judge also found that Silva's statements "advanced his valid educational objective[s]" and were made in a "professionally appropriate manner."¹¹² Although the judge made inconclusive findings on Silva's procedural claims, he did find that the university failed to follow the grievance procedures detailed in the Faculty Handbook, which was incorporated into Silva's contract.¹¹³ The judge ordered Silva reinstated with back pay.¹¹⁴

The AAUP investigated the Silva case while the district court case was pending.¹¹⁵ Its report emphasized that the university's handling of the incident involved "numerous serious departures from standards of academic due process."¹¹⁶ In particular, the AAUP was concerned that no faculty committee had ever evaluated Silva's conduct under orderly procedures and following a standard of proof that took account of Silva's academic freedom in the classroom.¹¹⁷ The report found valid the concerns of faculty at the university, which "saw the administration as enforcing the university's sexual harassment policy without

104. *Id.* at 300.

105. *Id.* at 303.

106. *Id.*

107. *Id.* at 307.

108. *Id.* at 297.

109. *Id.* at 332.

110. *Id.* at 312-13.

111. *Id.*

112. *Id.* at 313.

113. *Id.* at 321-32.

114. *Id.* at 332.

115. *Report, Academic Freedom and Tenure: University of New Hampshire*, 80 ACADEME 70 (Nov.-Dec. 1994). As is typical, the report was prepared by an investigating committee and then approved by Committee A on Academic Freedom and Tenure, chaired at the time by the distinguished authority on the Constitution and higher education, Professor Robert O'Neil.

116. *Id.* at 80.

117. *Id.*

taking principles of academic freedom into adequate account.”¹¹⁸ The report stated:

It might be reasonable to conclude that Professor Silva’s statement and conduct constituted sexual harassment and thus provided “adequate cause” for the sanctions that were imposed on him. Or one might conclude that Professor Silva’s remarks in the classroom warranted protection under principles of academic freedom and that he was guilty only of poor judgment in the ways that he sought to establish a close relationship with his students. Whatever the assessment, however, it should properly have been made by a faculty hearing body following a full adjudicative hearing.¹¹⁹

Comparing the court’s and AAUP’s assessment of the incident is revealing. Judge Devine crudely applied standard First Amendment analysis to find that Silva had a constitutional right to speak as he did in the classroom. He avoided the main conflict in values that animate the entire case by incredibly finding that Silva did not inject sex into the lesson—it was all in the minds of the female students. Given this wooden finding, presumably any response from any academic authority within the university would violate Silva’s constitutional rights by chilling the exercise of his rights on the basis of the content of his speech. By contrast, the AAUP acknowledged that speech in class that gratuitously involves sex can fall below professional standards and be sanctioned; it concerns itself with specifying the proper standards and procedures for schools to resolve such matter on academic grounds.¹²⁰ The court had no business vindicating Silva’s teaching, but the AAUP made a contribution by analyzing the defects in the university’s handling of harassment complaints based on classroom speech.

There is only one other reported case addressing college or university attempts to discipline a professor for sexually offensive speech in the classroom.¹²¹ Dean Cohen was a tenured professor at a community college in California.¹²² A student complained about his frequent use of profanity and sexually vulgar speech in a remedial writing class.¹²³ The college’s Grievance Committee found that Cohen had violated the school’s new sexual harassment policy, which defined sexual harassment as, *inter alia*, “verbal . . . conduct . . . [that] has the purpose or effect of unreasonably interfering with an individual’s academic performance or creating an intimidating, hostile, or offensive learning environment.”¹²⁴ The president and board of trustees, after an additional hearing, found Cohen had violated the policy and ordered him to publish a syllabus of his class describing his teaching style and content for prospective students and ordered him to attend a sexual harassment seminar.¹²⁵

118. *Id.* at 79.

119. *Id.*

120. *Id.* at 80.

121. *Cohen v. San Bernardino Valley Coll.*, 92 F.3d 968 (9th Cir. 1996).

122. *Id.* at 969.

123. *Id.* at 970.

124. *Id.* at 971.

125. *Id.* at 971.

Cohen sued, and the district court denied him relief.¹²⁶ The Ninth Circuit, however, held that the policy was unconstitutionally vague and remanded for an injunction against the college.¹²⁷ The court invoked the familiar nostrum that "statutes regulating First Amendment activities must be narrowly drawn to address only the evil at hand,"¹²⁸ and concluded that Cohen had been the victim of a "legalistic ambush," because "officials of the College, on an entirely ad hoc basis, applied the Policy's nebulous outer reaches to punish teaching methods that Cohen had used for many years."¹²⁹ The court plainly was concerned that Cohen would not have known that his teaching methods of many years were now unacceptable.

The case might well present an instance where the college failed to provide sufficient education to faculty about when unusual teaching techniques invade the rights of students; the published court of appeals opinion does not indicate how that issue was addressed by either the trial court or by the college hearing bodies. Still, it hardly seems surprising that the quoted language would embrace persistent irrelevant sexual comments in a classroom.¹³⁰ Moreover, the court gave no weight to the interest of the college in protecting the student complainant from language that led her to drop the class nor to the role of the college bodies in articulating and specifying how to accommodate the competing interests in a case where the teacher received essentially a warning.¹³¹

Critics of "political correctness" present Silva and Cohen as victims, college and university officials as enforcers of mindless leftist orthodoxy, and the judges as heroic defenders of freedom.¹³² Allen Kors and Harvey Silverglate, authors of

126. *Id.* at 970.

127. *Id.* at 973.

128. *Id.* at 972. The Court's language and citations signal its overall failure to distinguish between speech "statutes" enforced by the police and school regulations concerning internal academic speech. The court does quote from a case addressing university discipline of a professor for leading a disruptive demonstration against the killings at Kent State in 1970, but neglects to note that the Ninth Circuit in that case vacated the trial court's ruling that the university's rules restricting the professor's manner of protesting were vague or overbroad. See *id.* at 972, noting *Adamian v. Jacobson*, 523 F.2d 929, 934-35 (9th Cir. 1975). In any event, university regulation of ordinary speech can be analyzed more comfortably under general First Amendment approaches than can teaching.

129. *Cohen*, 92 F.3d at 972.

130. The AAUP defines sexual harassment that may subject a teacher to discipline to include speech that is:

reasonably regarded as offensive and substantially impairs the academic . . . opportunity of students If it takes place in the teaching context, it must also be persistent, pervasive, and not germane to the subject matter. The academic setting is distinct from the workplace in that wide latitude is recognized for professional judgment in determining the appropriate content and presentation of academic material.

AAUP, *Sexual Harassment: Suggested Policy and Procedures for Handling Complaints*, available at <http://www.aaup.org/statements/Redbook/rbsexha.htm> (last visited Oct. 12, 2004). Although this statement appropriately provides more protection to academic freedom than do the standards in either *Silva* or *Cohen*, either of those professors might have been successfully prosecuted under the AAUP standard.

131. *Cohen*, 92 F.3d at 968.

132. Of course, dismissed professors sometimes claim to have been penalized for their liberal orthodoxy. See *Scallet v. Rosenblum*, 911 F. Supp. 999, 1005 (W.D. Va. 1996) (finding that

what is generally considered the best popular attack on academic speech restrictions, describe Judge Devine's clumsy opinion in *Silva* as a deep exploration of the First Amendment that chastises "all who have tolerated verbal conduct bans at almost all our colleges and universities."¹³³ They also remark, "the gap between [these] two decisions [by the university and by Judge Devine] is the gap that now passes for academic justice and the decent rule of law."¹³⁴ They praise the *Cohen* court because it "understood not only academic freedom better than the college, but also pedagogy"¹³⁵ Professor Neil Hamilton places *Silva* among his pantheon of victims of leftist orthodoxy, the suffering of which he places on par with those who lost their jobs during the McCarthy period.¹³⁶ Yet, while one might think that the administrators used a heavy hand, it is difficult to see that *Silva*'s speech had political content or that barring such speech would need to hinder debate on any academic topics of significance.

The opinions discussed in this section share common virtues and vices. For virtues, the courts are seeking to preserve freedom in teaching against what they perceive to be intolerance. *Levin* does address an administrative assault on a professor for considered views presented in appropriate scholarly and public means. The others hardly involve attempts to stifle the exposition of ideas. They represent attempts by schools, however flawed, to accommodate legitimate concerns by female students about professors injecting alienating sexual references in class. That is their duty. It is striking that both cases involve low-level writing classes in two-year institutions. The female students complaining were older students pursuing practical education, not feminist theorists itching for a fight. These cases are not about ideology; they are about appropriate teaching and the respective authority of school and professor. As such, the solution cannot be found by mechanical citations to general free speech cases, but by careful consideration of the process and participants in internal decision making. Both schools in these sexy teaching cases should have done better on that score, but it is not a basis to lay down broad constitutional principles that deny schools the authority to make educational policy. These opinions do more than analyze professorial speech under general doctrines of the First Amendment rather than under academic freedom.¹³⁷ They transfer authority over internal disputes about teaching from the schools to the courts. To that extent, they threaten academic freedom more than protect it.¹³⁸

plaintiff disrupted business school curriculum by discussing diversity at length in class).

133. KORS & SILVERGLATE, *supra* note 15, at 119.

134. *Id.* at 120.

135. *Id.* at 116.

136. HAMILTON, *supra* note 99, at 82–83.

137. Some cases, of course, do find for universities and emphasize the need for deference to academic decision making. However, they also are unsatisfactory because they justify deference only on practical terms, such as the relative expertise of judges and educators or the need to avoid "disruption," rather than on values of academic freedom. *See, e.g., Rubin v. Ikenberry*, 933 F. Supp. 1425 (C.D. Ill. 1996). One reason for this seems to be the failure of universities themselves to argue for their constitutional interests. *See Bonnell v. Lorenzo*, 241 F.3d 800, 823 (6th Cir. 2001) (finding that college was not "claiming an interest in academic freedom *per se* in support of its position").

138. Not long ago, Temple University fired a tenured professor for incompetence, following

B. Students Disciplined For Offensive Speech

Reacting to concerns about racially charged incidents among students, some universities adopted "hate speech" codes beginning in the middle and late 1980s.¹³⁹ Although these varied in their terms, they typically subjected to discipline students that verbally insulted another individual student based on that student's race or ethnicity. Most contained some principle to further narrow their reach to words likely to cause violence or to create a "hostile" educational environment.¹⁴⁰ Many of these codes were drafted with the assistance of well-regarded law professors. Scholarly articles supporting such codes formed an early crest for the critical race studies movement in legal academe.¹⁴¹ Debate about their propriety became a national obsession. Yet every speech code challenged in a reported decision was struck down as violating the First Amendment or a complementary state constitutional provision.¹⁴²

The conflict in values in these cases raises fundamental questions about the role of the institution in setting ground rules for extracurricular speech. College and university policies regarding student curricular speech receive wide deference, and even expulsions, when resting on academic grounds, are largely insulated by institutional academic freedom.¹⁴³ In the not-too-distant past, colleges and universities had nearly the same control over extracurricular speech.¹⁴⁴ The recognition of student free speech rights has a complicated provenance growing out of the student protests in the 1960s; courts seemed to want to honor the students' political expressions, lest they reject the practices of liberal democracy for violent disruption.¹⁴⁵ Student free speech rights against universities reflect political values rather than academic ones. They are an appropriate evolution, consonant with modern educational assumptions and the constitutionally recognized political maturity of modern students.

a hearing by a faculty committee, on the grounds that he was persistently unsuccessful in teaching a basic mathematics course and was negligent about the needs of his students. See Robin Wilson, *The Teaching Equation That Didn't Add Up*, CHRON. HIGHER EDUC., Mar. 29, 2002, at A10. The professor is suing Temple claiming that the judgment about his teaching violates the First Amendment. *Id.*

139. See Byrne, *supra* note 60, at 401-02.

140. *Id.* at 412-15.

141. See, e.g., Charles Lawrence, *If He Hollers, Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431 (1990); Mari Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989); Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982). These articles combined outrage about racism with an epistemological and sociological challenge to notions of the neutrality of free speech. The broader conflict signaled by this fundamental challenge is discussed below. For a feminist perspective, see Mary Becker, *Conservative Free Speech and the Uneasy Case for Judicial Review*, 64 U. COLO. L. REV. 975 (1993). There are remarkably few articles taking the view that such speech regulation is unconstitutional. See, e.g., Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 244-50 (1992).

142. See, e.g., *Doe v. Univ. of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989).

143. See, e.g., *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 227 (1985).

144. See Byrne, *supra* note 60, at 427-28.

145. See ABE FORTAS, *CONCERNING DISSENT AND CIVIL DISOBEDIENCE* 61-64 (1968).

But the courts have not seriously analyzed how student political speech should reflect standards appropriate to an institution of higher learning. In *Healy v. James*,¹⁴⁶ the Supreme Court held that a college could not ban a student Students for a Democratic Society chapter because it disagreed with its political viewpoint, but could require the organization's leaders to agree to follow reasonable rules of conduct designed to protect the educational environment.¹⁴⁷ Justice Stevens, in his concurring opinion in *Widmar v. Vincent*,¹⁴⁸ affirmed that university officials appropriately make pervasive decisions on educational grounds concerning the content of speech both within and without the curriculum,¹⁴⁹ but this view has never earned clear endorsement by the Court.¹⁵⁰ Rather, the Court has sometimes denied the college or university any greater say over the standards for student extracurricular speech than the state has over the political speech of citizens—in one case using *Cohen* to find unconstitutional a university penalizing a graduate student for using profanity in a publication distributed on campus.¹⁵¹

Quite apart from the wisdom or utility of speech codes or the constitutionality of any one of them, court rejection of all litigated speech codes represents a significant loss for institutional academic freedom. These cases frustrate a considered endeavor to enhance the educational environment that, even if incorrect, should have been left to institutional authorities, when they could show that the restrictions advanced valid educational goals rather than simply prohibiting articulation of a viewpoint. The opinions displace academic norms by the civic norms of the First Amendment. Most egregiously, they utterly fail to acknowledge that the college or university stands in a different relation to the speech of its students than the government does to the speech of citizens generally.¹⁵²

146. 408 U.S. 169 (1972).

147. *Id.* at 170.

148. 454 U.S. 263 (1981).

149. *Id.* at 278–279 (Stevens, J., concurring). Justice Stevens wrote:

Because every university's resources are limited, an educational institution must routinely make decisions concerning the use of the time and space that is available for extracurricular activities. In my judgment, it is both necessary and appropriate for those decisions to evaluate the content of a proposed student activity. I should think it obvious, for example, that if two groups of 25 students requested the use of a room at a particular time—one to view Mickey Mouse cartoons and the other to rehearse an amateur performance of Hamlet—the First Amendment would not require that the room be reserved for the group that submitted its application first. Nor do I see why a university should have to establish a "compelling state interest" to defend its decision to permit one group to use the facility and not the other. In my opinion, a university should be allowed to decide for itself whether a program that illuminates the genius of Walt Disney should be given precedence over one that may duplicate material adequately covered in the classroom. Judgments of this kind should be made by academicians, not by federal judges, and their standards for decision should not be encumbered with ambiguous phrases like "compelling state interest."

Id. (internal citations omitted).

150. See also *Bd. of Regents of the Univ. of Wisc. Sys. v. Southworth*, 529 U.S. 217, 236–43 (2000) (Souter, J., concurring).

151. *Papish v. Bd. of Curators*, 410 U.S. 667, 670–71 (1973) (per curiam).

152. See Byrne, *supra* note 60, at 399–400. Robert Post has recently written insightfully about how the claim arose in the Berkeley free speech movement that the university should have

The best reasoned of these decisions struck down one of the most carefully drafted speech codes, that of the University of Wisconsin.¹⁵³ The "UW Rule," as it is referred to in the decision, drafted by university counsel with the help of three law professors, was adopted by the board of regents in response to concern about specific racist incidents and after substantial public comment.¹⁵⁴ The UW Rule prohibited:

[R]acist or discriminatory comments, epithets or other expressive behavior directed at an individual . . . if such comments . . . intentionally:

1. Demean the race, sex, religion, color, creed, disability, sexual orientation, national origin, ancestry or age of the individual or individuals; and
2. Create an intimidating, hostile or demeaning environment for education, university related work, or other university-authorized activity.¹⁵⁵

The drafters sought to fit the Code within the Supreme Court's narrow exception to its First Amendment rule prohibiting content-based regulation of speech. The "fighting words" exception as it has persisted (barely) permits government to prohibit face to face insults that are likely to lead to an immediate violent reaction.¹⁵⁶ The problem for the drafters was that they were not primarily concerned about violence, but with the intimidation and marginalization of the abused.¹⁵⁷ Accordingly, the limiting principle of the rule is when the insult creates "an intimidating, hostile or demeaning environment for education."¹⁵⁸ So anchoring the restriction might borrow legitimacy from Title VII cases recognizing that an employer can be guilty of discrimination for permitting employee epithets that create a hostile work environment.¹⁵⁹ The UW Rule was narrower than Title VII in that it required a specific intent to create a hostile environment.¹⁶⁰

no "specific interests in the regulation of communication and of its content that are distinct from those of the public at large." Robert Post, *Constitutionally Interpreting the FSM Controversy*, in *THE FREE SPEECH MOVEMENT: REFLECTIONS ON BERKELEY IN THE 1960S* 413 (Robert Cohen and Reginald E. Zelnick eds., 2002). He views it as a claim directed at local concerns rather than one having deep normative appeal or staying power.

153. See *UMW Post, Inc. v. Bd. of Regents of the Univ. of Wis.*, 774 F. Supp. 1163 (E.D. Wis. 1991).

154. The considerations that went into the rule are described by Patricia B. Hodulik, a lawyer for the university, in *Prohibiting Discriminatory Harassment by Regulating Student Speech: A Balancing of First Amendment and University Interests*, 16 J.C. & U.L. 573 (1990).

155. WIS. ADMIN. CODE § 17.06(2) (1989) (quoted in *UMW Post*, 774 F. Supp. at 1165-66).

156. See, e.g., *Lewis v. New Orleans*, 415 U.S. 130 (1974); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

157. See Byrne, *supra* note 60, at 413-15.

158. WIS. ADMIN. CODE § 17.06(2) (1989) (quoted in *UMW Post*, 774 F. Supp. at 1165-1166).

159. See Byrne, *supra* note 60, at 413. See generally, DAVID E. BERNSTEIN, *YOU CAN'T SAY THAT! THE GROWING THREAT TO CIVIL LIBERTIES FROM ANTIDISCRIMINATION LAWS* 23-24 (2003).

160. WIS. ADMIN. CODE § 17.06(2)(a)(2) (1989) (quoted in *UMW Post*, 774 F. Supp. at 1165-66).

Explanatory examples enacted as part of the rule made it clear that students would not violate the rule by politely expressing derogatory opinions of protected groups.¹⁶¹

The court invalidated the rule because it failed to meet the requirements of the fighting words exception as articulated by the Supreme Court.¹⁶² The court noted that the First Amendment does not permit government to ban speech because it lacks intellectual content or “is unlikely to form any part of a dialogue or exchange of views and because it does not provide an opportunity for a reply.”¹⁶³ The court further held that any inequality visited on students by being subject to epithets does not constitute state action and any impairment of education for targeted students could not be regulated by content-based speech restrictions.¹⁶⁴ The court gave no weight to the university’s role in creating an environment conducive to fruitful education or its expertise in evaluating the quality of speech.

The courts’ rejection of student speech codes became nearly insurmountable after the Supreme Court’s decision in *R.A.V. v. City of St. Paul*,¹⁶⁵ in which the Court held that government prohibition of racist expression, in that case burning a cross on the lawn of a black family, violates the First Amendment even if the speech falls within a category of unprotected expressions, like fighting words, when it singles out one viewpoint.¹⁶⁶ The effects of this can be seen in the Fourth Circuit’s decision finding a First Amendment violation in George Mason University’s suspending social events at a fraternity for racially offensive portrayals of black females at an “ugly women contest.”¹⁶⁷ The court both found that the portrayal had expressive value, and that the university, in any event, had sanctioned the fraternity’s performance “because it ran counter to the views the university sought to communicate to its students,” that is, that racism and sexism have no place in higher education.¹⁶⁸ The court acknowledged that the university has “the responsibility, even the obligation” to provide a learning atmosphere free from racism and sexism, but could not pursue these goals through “selective limitations upon speech.”¹⁶⁹ Judge Murnaghan disagreed with the majority at this point, arguing that “a university must be allowed to regulate expressive conduct which runs directly counter to its mission.”¹⁷⁰ Murnaghan’s is the only published judicial opinion in an offensive speech case to recognize that a college or university stands in a different relationship to student speech than do the police

161. *UMW Post*, 774 F. Supp. at 1175.

162. *Id.* at 1173.

163. *Id.* at 1175.

164. *Id.* at 1176. The court rejected all arguments that the UW Rule was unconstitutionally vague. *Id.* at 1178–81.

165. 505 U.S. 377 (1992).

166. *Id.* at 377.

167. See *Iota Sigma Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993 F.2d 386, 393 (4th Cir. 1993). See also *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995) (holding that coach’s use of derogatory word was not protected by academic freedom but that university’s discriminatory harassment policy was unconstitutionally vague and overbroad).

168. *Sigma Chi Fraternity*, 993 F.2d at 393.

169. *Id.* (quoting *R.A.V.*, 505 U.S. at 392).

170. *Id.* at 395.

because of its educational goals.¹⁷¹

While government at large may have too much coercive power but not the moral authority or expertise to be trusted with setting a minimum for personal expression, the college or university exists to create structures for promoting fruitful speech. That seems to me why the First Amendment would prohibit "governmental intrusion into the intellectual life of a university" and protect academic decision making at all.¹⁷² The selection of teachers and students, the organization of the curriculum, and the setting of intellectual standards for discourse exist to enhance the overall quality of speech in order to promote a search for truth and to facilitate education. Both faculty and students are required to meet scholarly and educational standards. The students subject to the UW Rule go to college because they are relatively ignorant and provincial. Their education aims to teach them how to think for themselves, but that process requires both knowledge about the larger world and discipline in how to express ideas. It is anomalous that a student referring to the Secretary of State in a political science paper by a racial epithet could be flunked, but the student has a constitutional right to address a classmate or teacher with the same epithet.

Yet courts recently have had trouble addressing student claims of First Amendment rights even in a curricular context. The recent remarkable case of *Brown v. Li*¹⁷³ shows how the absence of a workable standard of academic freedom threatens erosion of scholarly standards. After Brown's Master's thesis in Material Science was approved by his thesis committee, he added a scurrilous "disacknowledgements" section offering "special *Fuck You's* to the following degenerates for being an ever-present hindrance during my graduate career," naming various academic and political figures, and "Science."¹⁷⁴ The committee then concluded that the "disacknowledgements" section did not meet professional standards, that Brown should express his views in other fora, and that he would not receive his degree until the section was eliminated or rewritten.¹⁷⁵ The university Academic Freedom Committee rejected Brown's grievance, finding that Brown

171. Even private schools have had speech codes struck down. Stanford's was invalidated under a California statute giving students at private universities the same free speech rights that they have against the state. *Corry v. Leland Stanford Junior Univ.*, No. 740309 (Cal. Super. Ct., Feb. 27, 1995). The statute, CAL. EDUC. CODE § 94367 (West 2002), provides:

(a) No private postsecondary educational institution shall make or enforce any rule subjecting any student to disciplinary sanctions solely on the basis of conduct that is speech or other communication that, when engaged in outside the campus or facility of a private post-secondary institution, is protected from governmental restriction by the First Amendment to the United States Constitution or Section 2 of Article 1 of the California Constitution.

Obviously, I believe that this is unconstitutional on its face. It seems to me quintessentially "a governmental intrusion into the intellectual life of a university." Ironically, a religiously affiliated university probably could prohibit racist student speech, even in California, because of the free exercise clause.

172. *Sweezy v. New Hampshire*, 354 U.S. 234, 262 (Frankfurter, J., concurring).

173. 308 F.3d 939 (9th Cir. 2002) *cert. denied*, 538 U.S. 908 (2003).

174. *Id.* at 943.

175. *Id.* at 943-44.

had failed to follow reasonable rules for thesis approval.¹⁷⁶ Eventually, the school relented and awarded Brown his degree but would not place the thesis in the library.¹⁷⁷ Brown sued nonetheless, the district court granted the university defendants summary judgment on the federal claims, and Brown appealed to the Ninth Circuit, a divided panel of which affirmed without a majority rationale.¹⁷⁸

Judge Graber's opinion eventually reaches an appropriate standard: professors may hold students to reasonable academic standards. Although a student has some First Amendment rights even in curricular speech, a court must defer "to the university's expertise in defining academic standards and teaching students to meet them."¹⁷⁹ She even inches toward acknowledging that courts must afford this deference because of the institution's academic freedom. Her opinion suffers, however, from the doctrinal framework within which she believes she needs to work. The precedent upon which she relies deals with a *high school* teacher's control over a school newspaper produced in a journalism class,¹⁸⁰ and she struggles to fend off Judge Reinhardt's telling criticism that the scope of a student's intellectual freedom must be greater in graduate school than in high school.¹⁸¹

Judge Graber would have done better to rely directly on academic freedom to hold that a federal court has no authority to intrude on academic evaluations unless clearly shown not to have been based on reasonable academic standards. Lesser protection for articulation and application of academic standards would threaten disciplinary integrity. Students also should enjoy academic freedom within their schoolwork, which means that their work can be evaluated only by those competent to do so and on appropriate academic standards. One can imagine cases in which a student was flunked in bad faith for personal animus or political prejudice.¹⁸² However, here Brown had access to an academic review board, which specifically held that his academic freedom was not violated by insistence that he use the acknowledgments section of his thesis in a professional manner.¹⁸³ The decision of an appropriately constituted body following reasonable procedures should be conclusive. In any event, the complaining student should carry the burden of proving that the decision was not based on academic grounds.

Judge Reinhardt's dissent entirely disregards academic freedom and puts the

176. *Id.* at 945.

177. *Id.*

178. Judge Ferguson concurred in the result on the ground that Brown was being punished only for dishonesty, which raised no First Amendment issue. *Id.* at 955-956 (Ferguson, J., concurring).

179. *Id.* at 952.

180. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 270 (1988) (holding that high school newspaper published by students did not qualify as a public forum, so high school officials retained the right to impose reasonable restrictions on student speech).

181. Thus, I have no problem with a recent conclusion that *Kuhlmeier* does not apply to a university's efforts to regulate the yearbook. See *Kincaid v. Gibson*, 236 F.3d 342 (6th Cir. 2001).

182. Judge Graber no doubt is correct in saying that a teacher may require a student to write a paper from a particular point of view as an exercise, but it would be quite a different thing for a professor to penalize a student's paper because she disagrees with the political viewpoint implicit in the student's work. *Brown*, 308 F.3d at 953.

183. *Id.* at 945.

federal courts in the center of settling the propriety of enforcement of particular academic standards.¹⁸⁴ He rejects the distinction between curricular and extracurricular speech and explores a variety of criteria for assessing college and university limitations of speech in a variety of contexts that portend not only unending regulation of grading and seminar moderation, but the wholesale displacement of academic norms by civic norms.¹⁸⁵ He would have put the university to the burden of showing that its refusal to approve the "disacknowledgments" section was "substantially related to an important pedagogic purpose."¹⁸⁶ Thus, the university can refuse to approve any thesis (or presumably award a low grade for any student paper or examination) only if it proves to a judge not only that its action has a pedagogic purpose, but that the purpose is "important" and that the action taken has a sufficiently close fit to the purpose such that the judge will conclude that the action "substantially advances" the purpose.¹⁸⁷ Although the cost of defending the millions of such professional judgments to a non-academic would be appalling, much worse is the sapping of authority essential to carrying on the academic enterprise. This is a legal line that colleges and universities cannot permit to be breached.

The speech code cases cry out for a careful consideration of a state university's authority to set minimum standards for civilized extracurricular but intramural speech. My view has been that a college or university should be able to prohibit racial insults, but not the expression of any view (however offensive) that can be replied to reasonably:

A university should be able to prohibit racial insults because they are inconsistent with the rational search for truth, substitute rancor and ranting for evidence and argument, destroy the mutual courtesy that embodies respect for a reasonable adversary, and divert the victim of such [insult] from the intellectual work that the university provides her.¹⁸⁸

This seems consistent with the view expressed by the Supreme Court recently that students have a right not have their activity fees used to promote political causes with which they disagree, but that this right can be overborne by the educational purpose of the program.¹⁸⁹

Not only did the courts ignore the different speech roles of the institution and the government at large, but the attempt to implement speech codes called forth unprecedented, sustained, and vitriolic attacks on institutions for abandoning freedom of thought and expression in favor of some leftist orthodoxy. Some exercises of claimed power to punish speech clearly merited condemnation for insensitivity, incompetence, and even maliciousness. But often, it was in the interests of those who took up the cry of political correctness to magnify and generalize these failings. I take up these complex matters of characterization and

184. *Id.* at 962-63.

185. *Id.* at 956-57 (Reinhart, J., dissenting).

186. *Id.* at 964 (citing *United States v. Virginia*, 518 U.S. 515, 533 (1996)).

187. *Id.*

188. Byrne, *supra* note 60, at 440.

189. *See Bd. of Regents of the Univ. of Wisc. Sys. v. Southworth*, 529 U.S. 217, 233 (2000).

publicity below, but the speech codes in practice generated anger and disparagement that probably exceeded the good they did. Many were repealed and few are invoked today. Fortunately, the improved racial climate on most campuses a decade later makes them often a moot point. What remains are precedents rejecting without serious consideration the authority of colleges and universities to set standards of discourse in extracurricular affairs.

There is an intriguing coda to consideration of speech codes. In *Southworth v. Board of Regents of the University of Wisconsin*,¹⁹⁰ the Supreme Court upheld using mandatory student activity fees to fund student advocacy having educational benefit against a claim that such a fee violates the First Amendment right of a student not to have his money used to promote ideas with which he disagrees.¹⁹¹ The Court concluded that the university's educational interest in promoting speech by its students outweighed infringement of the plaintiff student's valid interest in not supporting speech with which he disagreed, so long as the university followed a strict "viewpoint neutrality" in the allocation of collected funds.¹⁹² Certainly, the decision, which was unanimous, was an important win for colleges and universities, indicating that educational purposes can outweigh recognized First Amendment interests in the extracurriculum, but there are a few disquieting aspects to the Court's opinions.

Justice Kennedy repeatedly hammers the point that the institution must not prefer some "viewpoints" to others for the program to be sustained. "Viewpoint neutrality is the justification for requiring the student to pay the fee in the first place and for ensuring the integrity of the program's operation once the funds have been collected."¹⁹³ It is not clear how far this principle extends. Could the university prefer the Latin club to the book burning club? The issue was not explored because the parties stipulated that the program was administered in a viewpoint-neutral manner.¹⁹⁴ As a result, the Court did not need to mandate that such programs be viewpoint neutral.¹⁹⁵ However, thinking of the speech code cases, the court may have wanted to state generally that any limitation of student speech cannot favor a particular view.

A clue to this is found in the concurring opinion of Justice Souter, which takes pains to place the case in the context of institutional academic freedom, even quoting the four freedoms. He notes:

While we have spoken in terms of a wide protection for the academic freedom and autonomy that bars legislatures (and Courts) from imposing conditions on the spectrum of subjects taught and viewpoints expressed in college teaching (as the majority recognizes), we have never held that universities lie entirely beyond the reach of students' First Amendment rights.¹⁹⁶

190. 529 U.S. 217 (2000).

191. *Id.* at 233.

192. *Id.*

193. *Id.* at 233.

194. *Id.* at 234.

195. *Id.*

196. *Id.* at 238–39 (Souter, J., concurring).

His point is that the university's responsibility for making choices about speech values should be weighed in considering the scope of any interest the student might be found to have. But after the quoted language comes a footnote: "Indeed, acceptance of the most general statement of academic freedom (as in the South African statement quoted by Justice Frankfurter) might be thought even to sanction student speech codes in public universities."¹⁹⁷

It is extraordinary to encounter this charming dicta in such a place. This is just the consideration so absent from the speech code cases themselves. Justice Souter's reference suggests that he has not closed his mind on the topic, but his use of the word "even" suggests his awareness of the fact that the claim is unthinkable to some members of the majority. One cannot help supposing that the matter was discussed at conference.

C. Faculty as Government Mouthpieces

Faculty at state universities are state employees, of course; indeed their acts constitute state action giving rise to constitutional claims against them. Yet historically, the AAUP approach to academic freedom drew no distinction between faculty at public and at private institutions; both need the professional autonomy necessary for scholarship and teaching. As we saw above, teaching at a state institution can even expand professors' rights by giving them First Amendment claims against their institution. Moreover, professors at state universities have enjoyed protection against penalty for nonacademic speech on matters of public concern under doctrines encompassing all public employees.¹⁹⁸

For years courts have analyzed regulation of professors' classroom or other academic speech under doctrine established either concerning public employee speech generally or the authority of high schools to regulate student speech. The first line of cases grant state university professors limited protection against dismissal when their speech touches on matters of "public concern."¹⁹⁹ The core case is one in which a public school teacher writes a letter to the newspaper criticizing the conduct of his department. If the topic written about is a matter of "public concern," then the court balances the value of the communication against the interests of the employer in avoiding "disruption" of its work.²⁰⁰ Application of this test—however well it works in general²⁰¹—to classroom speech begs all

197. *Id.* at 239 n.5.

198. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968). There is a long debate about the extent to which a professor's nonacademic speech merits protection as a matter of academic freedom. See William Van Alstyne, *The Specific Theory of Academic Freedom and the General Issue of Civil Liberty*, in *THE CONCEPT OF ACADEMIC FREEDOM* 59 (Edmund L. Picoffs ed., 1975).

199. See, e.g., *Connick v. Myers*, 461 U.S. 138 (1983).

200. In *Waters v. Churchill*, 511 U.S. 661, 668 (1994), the Court held that the government employer's acting upon a reasonable belief that the speech would cause disruption is enough to satisfy the First Amendment.

201. A recent careful examination found that, because the meaning of public concern is so unclear, lower court decisions "often yield contradictory results that strip the public concern prong of all predictability and leave both public employers and public employees uncertain of their rights." Karin B. Hoppmann, Note, *Concern with Public Concern: Toward a Better*

the important questions implicated by academic freedom.²⁰² First, the importance of academic speech cannot be assessed under the rubric of "public concern." Teaching and scholarship are part of a process of speech of great social importance, but any single instance may seem removed indeed from the concerns of the public. Not surprisingly, some cases hold that classroom speech nearly always is a matter of public concern,²⁰³ others come close to holding that it never is,²⁰⁴ but most involve ad hoc judgment about whether the statement was educationally appropriate, quite a different matter than whether it was of public concern.²⁰⁵ Second, the emphasis on the employer's concern about disruption and efficiency seems out of place in assessing the relation between professor and school, where governance is more collegial than hierarchical, and conformity of expression antithetical.²⁰⁶

Several courts prefer the test derived from *Hazelwood School District v. Kuhlmeier*,²⁰⁷ which upheld a high school's regulation of the student newspaper produced in a journalism class, because such regulation was "reasonably related to legitimate pedagogical concern."²⁰⁸ This test at least addresses the state's interest as educator, while the *Pickering* approach does not.²⁰⁹ Moreover, it directs attention to whether the school based its decision on academic grounds, the touchstone for institutional academic freedom. However, the rationale of *Kuhlmeier* invokes interests that have no place in weighing the scope of a professor's classroom speech rights, such as the immaturity of high school students, the school's duty to instill values in them, and the risk of attribution of school newspaper views to school authorities.²¹⁰ As in the public employee doctrine cases, courts applying this test must reach outside it to articulate the

Definition of the Pickering/Connick Threshold Test, 50 VAND. L. REV. 993, 1008 (1997).

202. See Ailsa Chang, Note, *Resuscitating the Constitutional "Theory" of Academic Freedom: A Search for a Better Standard Beyond Pickering and Connick*, 53 STAN. L. REV. 915 (2001).

203. See, e.g., *Hardy v. Jefferson Cmty. Coll.*, 260 F.3d 671, 679 (6th Cir. 2001) (holding that "classroom instruction will often fall within the Supreme Court's broad definition of 'public concern'").

204. See, e.g., *Rubin v. Ikenberry*, 933 F. Supp. 1425, 1443 (C.D. Ill. 1996) ("Course content is not a matter of public concern.").

205. This can be seen in comparing two cases where professors were dismissed essentially for using the word "nigger." In *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995), the head basketball coach's dismissal for using the epithet in a locker room talk to his players was upheld, the court stating: "The University has a right to disapprove of the use of the word . . . as a motivational tool" *Accord* *Gee v. Humphries*, No. 95-40031-RH (N.D. Fla. 1996). In *Hardy*, 260 F.3d at 679, the court found the use of the word "germane to the subject matter" being taught.

206. Chris Hoofnagle, *Matters of Public Concern and the Public University*, 27 J.C. & U.L. 669, 706 (2001). While Hoofnagle correctly points out that intellectual freedom should not be balanced against potential disruption, he does not acknowledge that the university has other interests in limiting speech that flows from its educational mission. *Id.*

207. 484 U.S. 260 (1988).

208. *Id.* at 273.

209. *Bishop v. Aranov*, 926 F.2d 1066, 1074 (11th Cir. 1991). See *Rubin*, 933 F. Supp. at 1425. See also *Vanderhurst v. Colo. Mountain Coll. Dist.*, 208 F.3d 908, 914-15 (10th Cir. 2000) (discussing educational interests and pedagogical concerns).

210. See *Scallet v. Rosenblum*, 911 F. Supp. 999, 1011 (W.D. Va. 1996).

values at stake in classroom speech cases.

The relation between state universities and their professors was placed in a new light by the decision in *Rust v. Sullivan*,²¹¹ generally enhancing control by the government over the speech of its employees. The Court signaled that state university professors require special protection from government control:

[W]e have recognized that the university is a traditional sphere of free expression so fundamental to the functioning of our society that the Government's ability to control speech within that sphere by means of conditions attached to expenditure of government funds is restricted by the vagueness and overbreadth doctrines of the First Amendment.²¹²

While this was a welcome recognition, it did affirm that professors are state employees who fall within the *Rust* principle to some extent. It also failed to use the words "academic freedom."

In *Southworth*, discussed above, the Court again indicated that its First Amendment analysis of the university's "viewpoint neutral" student extracurricular speech program would not provide a framework for analyzing curricular speech issues.

Our decision ought not to be taken to imply that in other instances the University, its agents or employees, or—of particular importance—its faculty, are subject to the First Amendment analysis which controls in this case. Where the University speaks, either in its own name through its regents or officers, or in myriad other ways through its diverse faculties, the analysis likely would be altogether different.²¹³

The Court cited *Rust*, but only generally and not to the quote given above directed at academic freedom. The Court then characterized the speech in *Southworth* as "not that of the University or its agents."²¹⁴

Again, the Court acted appropriately in making clear the limits of its ruling. But the language used, however casually chosen, raises alarm. It runs counter to all notions of academic freedom to suggest that the university speaks through its faculty or that faculty speak as agents of the university. The Court recognized that the faculty do not speak in the "name" of the university. But the opinion gives as the starting point for analysis of speech by professors that they are employees or agents of the government.²¹⁵ Moreover, it does not distinguish between regulations of speech formulated by the state or by the university itself. This approach has a capacity for mischief.

One might well dismiss such concerns as overheated concerns of a Supreme Court Kremlinologist, were it not for the subsequent en banc decision of the Fourth Circuit in *Urofsky v. Gilmore*.²¹⁶ This is certainly the worst academic freedom

211. 500 U.S. 173 (1991).

212. *Id.* at 200 (citing *Keyishian v. Bd. of Regents State Univ. of N.Y.*, 385 U.S. 589, 603, 605–06 (1967)).

213. *Bd. of Regents of the Univ. of Wisc. Sys. v. Southworth*, 529 U.S. 217, 234–35.

214. *Id.* at 235.

215. *Id.*

216. 216 F.3d 401 (4th Cir. 2000).

decision since the notorious Bertrand Russell case in 1940.²¹⁷ The court upheld a Virginia statute that prohibits any state employee from viewing “sexually explicit content” on computers owned or leased by the state.²¹⁸ The statute was challenged by a group of professors at public universities in Virginia, who argued that it violated their constitutional right to academic freedom, at least when they viewed such material for professional research.²¹⁹ Not only did the court reject the explicit claim and uphold the ban, but it broadly denied that professors have *any* constitutional right of academic freedom and reasoned that the state had as much right to control the teaching, research, and scholarship of professors at state universities as it did the pleadings of a state lawyer or the reports of state bureaucrats.²²⁰ Citing *Rust*, the court claimed that the state has nearly complete control over the professional speech of its employees, including professors, when the speech is part of the employees’ duties.²²¹ The court stated that “the government is entitled to control the content of the speech because it has, in a meaningful sense, purchased the speech at issue through a grant of funding or payment of a salary.”²²²

Despite the relative inconsequence of the restrictions themselves, the court’s reasoning broadly withdraws constitutional protection against government interference for a core scholarly activity of professors—research.²²³ Nothing in the reasoning distinguishes computers from state libraries, including those at state universities, nor does it distinguish the sexually explicit material at issue from other pictures, books, or electronic media. Finally, the broad rationale that the state owns and may dictate the professional speech of professors at state universities, just as fully as it does the information given out by a clerk at the department of motor vehicles, could justify the state insisting on the topics and even opinions that a professor may express in class or in scholarship. While it is incredible that a state would push or a federal court would permit matters to reach such a state of political ventriloquism, the court’s broad endorsement of control and censorship suggests no principle that would prevent it.

The court acknowledged that the statute would violate the norms of academic freedom developed by the AAUP.²²⁴ But, citing me, it held that the Constitution does not protect individual academic freedom, but only that of the university itself.²²⁵ The university’s constitutional interest was satisfied by the statutory provisions permitting “supervisors” to provide waivers for bona fide research

217. See Byrne, *Scholarship and Court*, *supra* note 21, at B13; *supra* notes 41–42 and accompanying text.

218. *Urofsky*, 216 F.3d at 404 (citing VA. CODE ANN. § 2.1-805 (Michie Supp. 1999)).

219. *Id.* at 406.

220. *Id.* at 415.

221. *Id.* at 407–08.

222. *Id.* at 408.

223. Interestingly, the court could not use general First Amendment doctrine to focus the professor’s rights, as in *Silva* or *Cohen*, because free speech generally does not deal with research or access to information. This is another instance in which the values and procedures of academic freedom are more protective of intellectual liberty than First Amendment law at large.

224. *Urofsky*, 216 F.3d at 410–11.

225. *Id.* at 410 (citing Byrne, *Special Concern*, *supra* note 21, at 253).

projects.²²⁶

There are at least two glaring errors in the court's opinion. First, it ignores the fact that the statute at issue, passed by the state legislature, does regulate the university itself, as well as professors. The case does not involve internal disputes about educational or scholarly standards, but the very type of "governmental intrusion into the intellectual life of a university" that the Supreme Court repeatedly has condemned and that is referred to in *Rust* itself.²²⁷ Although deans may grant waivers to individuals, the law significantly changes the power relation between faculty and administrators in the core academic activities of research and teaching. Professors will be deterred from investigating sources within the banned category by red tape and embarrassment. The statute at issue empowers the administrators to determine what constitutes "bona fide" research;²²⁸ such questions should be addressed only by peers in the process of professional evaluation. Moreover, the dean implementing a state statute may have quite different bureaucratic concerns than in a strictly academic issue. Justice Frankfurter warned against the varieties of governmental intrusion in *Sweezy*: "It matters little whether such intervention occurs avowedly or through action that inevitably tends to check the ardor and fearlessness of scholars, qualities at once so fragile and so indispensable for fruitful academic labor."²²⁹ The *Urofsky* court missed an important point in stating that administrators should not be presumed to abuse their discretion: the state should not give them the power to do so and should not restructure core power relations for its own ends.

Second, the court should have made room for academic freedom in shaping its *Pickering* analysis.²³⁰ The court sought to reconcile the interests of the government as employer with those of the employee in speaking freely by drawing a bright line between speech on the job, which the First Amendment does not protect, and speech off the job on matters of public concern, which will be protected. But the whole justification for academic freedom is that the professional speech of professors does concern the public. While the school administrators have a valid interest in the quality of that speech, they have none in its political drift. *Urofsky* vividly illustrates the disasters that can flow from assessing college and university speech issues without sensitivity for academic values and the tradition of academic freedom.²³¹ The First Amendment has no concern for intellectual quality.

226. *Id.* at 405.

227. *See, e.g., Sweezy v. New Hampshire*, 354 U.S. 234, 261 (1957) (Frankfurter, J. concurring).

228. *Urofsky*, 216 F.3d at 404–05.

229. *Sweezy*, 354 U.S. at 262.

230. *Urofsky*, 216 F.3d at 405–07 (citing *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968)).

231. A student author noted that the court's approach protects a low-level state employee pursuing research in her spare time, while denying it to a professor with a valuable expertise. *Recent Cases*, 114 HARV. L. REV. 1414 (2001).

D. Affirmative Action in Student Admissions

As noted above, Justice Powell's opinion in *Bakke*²³² served as a lynchpin for applying the concept of institutional academic freedom to college and university policy-making. Justice Powell indicated that Harvard's approach to using race in admissions was constitutionally permissible, notwithstanding any applicant's interests in being considered without regard to race, because a college or university could conclude that creating a diverse student body would enhance education for all, and race is one among several factors that can legitimately contribute to educational diversity.²³³ This judgment deserved constitutional deference because deciding on academic grounds who may be admitted to study, is among the protected freedoms of a college or university. Justice Powell expressly connected racial diversity in the student body with the values of academic freedom praised in *Sweezy*: "The atmosphere of 'speculation, experiment, and creation,'—so essential to the quality of higher education—is widely believed to be promoted by a diverse student body."²³⁴

The judicial examinations of racial preferences in admissions within the past decade, before *Grutter v. Bollinger*, slighted the constitutional values served by admissions decisions being made by colleges and universities on academic grounds rather than by courts. The court in *Hopwood v. Texas*²³⁵ held that the University of Texas School of Law could not use race as a factor in admitting students.²³⁶ Concerning the Powell approach in *Bakke*, the court held that the Supreme Court had rejected diversity as a permissible justification in subsequent cases and that, in the court's opinion, ethnic diversity in the student body did not promote intellectual diversity.²³⁷ This misses the point. Justice Powell did not conclude himself that racial diversity was a compelling educational value but found that well regarded universities reasonably believed so on academic grounds.²³⁸ The university's policy was entitled to deference and constitutional weight because of academic freedom.

Thus, *Hopwood* and similar decisions diminished academic freedom on a formerly recognized point.²³⁹ It is frustrating that they do not explain why the

232. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978).

233. *Id.*

234. *Id.* at 312 (citing *Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring)).

235. *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996).

236. *Id.*

237. *Id.* at 944–45. *See also* *Grutter v. Univ. of Mich.*, 137 F. Supp. 2d 821, 847–49 (E.D. Mich. 2001) ("Therefore, this court concludes that *Bakke* does not stand for the proposition that a university's desire to assemble a racially diverse student body is a compelling state interest.").

238. Justice Powell did believe that racial diversity furthered educational goals. He once explained this to me by describing how much the Court's deliberations about issues of racial justice benefited from the presence of Justice Marshall, who impressed Powell with his accounts of the realities under which African Americans lived. This does not conflict with the judgment of Justice Powell's biographer that Powell embraced educational diversity because it provided a workable outcome. "Diversity seemed to offer a way to reject rigid quotas without banning racial preferences." JOHN C. JEFFRIES, JUSTICE LEWIS F. POWELL, JR. 476 (1994).

239. Courts debated what weight to afford Justice Powell's sole, but controlling *Bakke* opinion until *Grutter* rendered the question moot.

university should not receive deference in this area. Judge Smith acknowledged in *Hopwood* that Powell justified his views by the First Amendment, but rejected its applicability to state universities.²⁴⁰ "The First Amendment generally protects citizens from the actions of government, not government from its citizens."²⁴¹ He then asserts that *Sweezy* sought to protect only "the First Amendment rights of individual scholars."²⁴² Judge Smith utterly failed to show even awareness of the several Supreme Court opinions after *Bakke* where the Court had affirmed that state universities enjoy some degree of institutional academic freedom.²⁴³ Rather, the Fifth Circuit depended on subsequent Supreme Court affirmative action cases to depart from Justice Powell's more lenient view about what was permissible, while ignoring subsequent cases confirming that academic freedom has an institutional component.²⁴⁴ Decisions upholding the use of race to achieve a diverse student body similarly failed to embrace the foundations of academic freedom.²⁴⁵

While one can readily understand why opponents of using race as a factor in college and university admissions would ignore the constitutional basis for

240. *Hopwood*, 78 F.3d at 943-44.

241. *Id.* at 943 n.25.

242. *Id.*

243. *E.g.*, *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 (1985).

244. The grounding of *Bakke* in institutional academic freedom also was mishandled in *Johnson v. Bd. of Regents of the Univ. of Ga.*, 263 F.3d 1234 (11th Cir. 2001). Although in that case, the court did not reach the issue of whether diversity was a compelling state interest because it found the university's admission process not to be narrowly tailored to achieve that goal, its statement of the diversity rationale misses the point:

It is possible that the important purposes of public education and the expansive freedoms of speech and thought associated with university environment—recognized in other decisions by the Court—may on a powerful record justify treating student body diversity as a compelling interest. The weight of recent precedent is undeniably to the contrary, however.

Id. at 1250-51 (internal citations omitted).

The court's reference to "expansive freedoms of speech and thought" of a university seem to refer to institutional academic freedom, although the court seems reluctant to be explicit. *Id.* at 1250. Indeed, it never acknowledges that these freedoms are constitutionally protected. For these freedoms, it cites inapposite elementary school cases having nothing to do with diversity or academic freedom. *Id.* at 1250 n.16. More ominously, the court's reservations about a "powerful record" and "possible" deference make it plain that it viewed the courts—not the universities—as the bodies who should make the judgments about the educational value of diversity. This stands *Bakke* on its head.

245. In *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002), *aff'd*, 539 U.S. 306 (2003), the Sixth Circuit followed the Powell opinion in *Bakke* both in concluding that diversity is a compelling interest and in finding a similar admissions system narrowly tailored. 288 F.3d at 738-39, 744-45. Nonetheless, the court never mentioned academic freedom. While it did state that "some degree of deference must be accorded to the educational judgment of the Law School," *Id.* at 751, it does not acknowledge that the deference is constitutionally required. It does cite *Ewing*, but only for the need for deference, leaving the mistaken sense that this deference is pragmatic, based on relative competence, rather than principle, based on academic freedom. *Id.* at 751. Similarly, in *Smith v. Univ. of Wash. Law School*, 233 F.3d 1188, 1197-98 (9th Cir. 2000), the court affirmed that pursuit of a diverse student body was a permissible goal for an institution of higher learning, but never mentioned that reasonable pursuit of the goal was protected by academic freedom.

deference to the institution's judgment, the reticence of supporters seems misguided. How significant race is as a factor in fostering diverse views among an entering class has been the subject of debate for thirty years. Different reasonable views are possible. The point of Justice Powell's opinion in *Bakke* is that, given that such a belief is reasonable, a college or university's choice to include race as an admissions factor among many to create a diverse class is constitutionally protected. The court's role is only to see that using race in this way rests reasonably on academic grounds.²⁴⁶

Unfortunately, the means embraced to further ethnic diversity in jurisdictions constitutionally forbidden to use race also threaten academic freedom. In the wake of *Hopwood*, the Texas legislature passed a statute providing that any person graduating in the top 10% of her class in a Texas public high school must be admitted to a state university as a first-time freshman.²⁴⁷ The idea is that since Texas public high schools are so segregated in fact by race and class, admitting the top 10% from every school will promote diversity without drawing any racial lines. California, forbidden also to consider race in admissions by the constitutional amendment embodied in Proposition 209,²⁴⁸ has adopted a similar program.²⁴⁹

These well-meaning reactions to judicial limits on college and university selection of students prevent the college or university from selecting at all. To the extent they apply, they eliminate all ability for the college or university to determine on academic grounds who may be admitted to study.²⁵⁰ Do these

246. There is a principled counter to this argument, which I developed to some extent in a prior article. See Byrne, *Special Concern*, *supra* note 21, at 330–39. Institutional academic freedom extends only to academic matters; there are a range of college and university policies, touching on what I have termed "democratic values" which are amenable to regulation by political bodies on the basis of civil norms. Thus, the federal statutes may prohibit race or sex discrimination in administering college and university programs. Just as Virginia Military Institute's belief that its education worked better for an all-male student body could be displaced by the civic commitment against sex discrimination, a racially diverse student body might be displaced by a strong civic commitment never to use race in government decision making. *United States v. Virginia*, 518 U.S. 515 (1996). See *Univ. of Pa. v. EEOC*, 493 U.S. 182, 198–99 (1990). This would involve overruling *Bakke* on its specific holding, but would not negate the existence of academic freedom to shield university decision making in other areas less vital to the civic order. *Grutter* concludes that the public consensus against using race is not so strong as to displace college and university use of it in admissions. It seems plausible that the Constitution permits some sexually separate but equal programs in higher education. See *infra* notes 283–284 and accompanying text.

247. TEX. EDUC. CODE ANN. § 51-803 (Vernon Supp. 2004–05) (effective Aug. 30, 1999).

248. See CAL. CONST. art. I, § 31(a) (approved Nov. 5, 1996) (codifying Proposition 209).

249. See ROBERT K. FULLINWIDER & JUDITH LICHTENBERG, *LEVELING THE PLAYING FIELD: JUSTICE, POLITICS, AND COLLEGE ADMISSIONS* 192–93 (2004).

250. Professor Guinier romanticizes the Texas plan in her thoughtful argument for emphasizing the "democratic" element in selective college admissions. Lani Guinier, Comment, *The Supreme Court, 2002 Term: Admissions Rituals as Political Acts: Guardians at the Gate of our Democratic Ideals*, 117 HARV. L. REV. 113, 162–71 (2003). The coalition between liberal, urban state representatives and conservative rural representatives that she praises as point to a coalition for reform can be seen more critically as a straightforward redistribution of public goods to their own constituents. See *id.* at 162–63. In general, she slights unduly the value of having various standards and approaches to admissions left primarily in the hands of educators.

statutes violate academic freedom? This is a difficult question, to which I cannot dedicate much space here, but my sense is that they do not so long as the percentage of the entering class admitted under this provision is relatively low. But should state statutes fill large percentages of a class with mandates, it would approach a point at which I would conclude that academic freedom had been violated because it would interfere with the educational goals of the institution.²⁵¹ A school must have basic control of its admissions standards to set intellectual and educational goals.

The mumbling of decisions slighting academic freedom in analyzing admissions cases makes even more startling the recent blast from the ram's horn. The Supreme Court's affirmation of the use of race in university admissions to achieve student body diversity in *Grutter v. Bollinger*²⁵² represents the most important victory to date for institutional academic freedom. The Court expressly endorsed Justice Powell's opinion from *Bakke* and held that "student body diversity is a compelling state interest that can justify the use of race in university admissions."²⁵³ Moreover, the "compelling" quality of the university's interest stems from First Amendment protection for the autonomy of good faith educational decision making.²⁵⁴ The Court also found that the University of Michigan Law School's admissions system was "narrowly tailored" to admit a racially diverse class without indulging quotas or categorical preferences.²⁵⁵

The importance of the decision for academic freedom can be understood from the doctrinal dilemma the decision resolved. The current Court had clearly embraced the position that all uses of race in government decision making require justification by a "compelling state interest."²⁵⁶ The only purpose that had clearly justified such use of race was the remediation of specific instances of past de jure racial discrimination,²⁵⁷ and benign motives, such as addressing the consequences of societal racial prejudice generally or providing racial role models for elementary school students, had been rejected as inadequate.²⁵⁸ As noted above, several courts of appeal had held that racial diversity in higher education was never a compelling state interest. Thus, the doctrinal pressure seemed to be against finding diversity in this context to be a sufficient interest.

The logic of Justice O'Connor's opinion for the Court required that great weight be placed upon institutional academic freedom to make the case that student body

251. A state legislature has an obvious interest in the composition of the student body at a state university. The people contribute substantial tax revenues to make these schools broadly affordable to promote opportunity for the state's students. But at some point, the legitimate democratic pursuit of access and mobility can so interfere with core educational and scholarly values, that legislation concerning admissions and financial aid should be found to violate constitutional academic freedom. See Byrne, *Special Concern*, *supra* note 21, at 332-33.

252. 539 U.S. 306 (2003).

253. *Id.* at 325.

254. *Id.* at 329.

255. *Id.* at 307.

256. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

257. See *Wygant v. Jackson Bd. Of Educ.*, 476 U.S. 267 (1986); *Richmond v. T.A. Cronson Co.*, 488 U.S. 469 (1989).

258. See *Grutter*, 539 U.S. at 352 (Thomas, J., concurring in part and dissenting in part) (discussing *Wygant*, 476 U.S. 267 (1986)).

racial diversity amounts to a compelling interest. The Court began by stressing its deference to the law school's judgment that "diversity is essential to its educational mission."²⁵⁹ The Court, while stressing that it was engaged in strict scrutiny, insisted:

Our holding today is in keeping with our tradition of giving a degree of deference to university's academic decisions, within constitutionally prescribed limits. We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition Our conclusion that the Law School has a compelling state interest in a diverse student body is informed by our view that attaining a diverse student body is at the heart of the Law School's proper institutional mission, and its "good faith" on the part of a university is "presumed" absent "a showing to the contrary."²⁶⁰

I omit from this long excerpt the Court's quoting of Justice Powell's *Bakke* opinion to the effect that choosing students on academic grounds comes within a university's First Amendment rights. The point is clear: creating a diverse student body is a compelling state interest because institutional academic freedom requires deference to the college's or university's judgment that such a class furthers educational goals.

The opinion, however, also provides bases for arguing against this interpretation. The Court also apparently made an independent judgment that diversity in higher education was important. It embraced the views expressed in amicus curiae briefs by business leaders and military leaders that diversity is important in business and military command as well, and also stressed the general social benefits from the educational pathways to power and success being "visibly open" to people of all races.²⁶¹ Such considerations range far from the academic freedom right to decide on academic grounds who may be admitted to study. To the extent that the Court formed its own assessment of social interests in mobility or citizenship, its decision, however important for racial justice, would not enhance institutional academic freedom. But the Court presented the social considerations only as having "further bolstered" the law school's educational arguments.²⁶² Primary stress lay on academic freedom. And the Court expressly adopted the rationale of Justice Powell in *Bakke*,²⁶³ whose embrace of academic freedom is more enthusiastic, and wove Powell's words through the heart of its opinion.

259. *Grutter*, 539 U.S. at 328.

260. *Id.* at 328–329 (quoting *Bakke*, 438 U.S. 265, 318–19 (1978) (internal citations omitted)).

261. *Id.* at 332.

262. *Id.* at 330.

263. Although one must pause on how the *Grutter* court described "Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions." *Id.* at 325. The description omits reference to academic freedom. The Court also refers to "our tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits." *Id.* at 328. The Court avoided giving a ringing endorsement in its words to constitutional autonomy in principle.

Future litigants will be able to quote or cite Powell in *Bakke* with as much force as O'Connor in *Grutter*. Still, one cannot imagine the Court deferring to educational policies it found absurd or repellant.

The importance of academic freedom to the Court's decision can be clarified by comparing the Court's reasoning with the opinion of Justice Thomas, concurring in part and dissenting in part.²⁶⁴ He disagrees with the majority about many things, but what I want to examine is his refusal to take seriously constitutional academic freedom. This refusal can be seen clearly in his preliminary point that he finds "perplexing" the Court's failure to distinguish its rejection of a school board's judgment that a racially diverse faculty would have educational benefits in a prior case;²⁶⁵ this would be a material argument if it were not doctrinally clear that only universities enjoy academic freedom, a point neither the Court nor Justice Thomas discussed.²⁶⁶ But Justice Thomas presses his skepticism much further. He attacks comprehensively, if indirectly, the notion that academic decision making is entitled to any constitutional protection, finding no constitutional interest in having law schools at all or in using academic criteria for admission. He states, "[T]here is no basis for a right of public universities to do what would otherwise violate the Equal Protection Clause."²⁶⁷

Justice Thomas's examination of the precedents on academic freedom lacks intellectual seriousness, and he wholly ignores the scholarly literature on the subject. He quotes Justice Frankfurter from *Sweezy*, but only quibbles about the precise holdings of several cases and moves on with a sweeping dismissal. He does make an important point: the *Grutter* court did not explain adequately how institutional academic freedom can counter other constitutional prohibitions.²⁶⁸ The Court's rhetoric blazes when extolling diversity within elite institutions rather than when praising academic autonomy. Indeed, the *Grutter* decision differs from all prior academic freedom decisions in using modest rhetoric to enlarge the substance of academic freedom rather than using fiery rhetoric to make a narrow decision.²⁶⁹ But in the clinch, *Grutter* justifies the weight it affords educational autonomy only by quoting Powell in *Bakke*.²⁷⁰

264. *Id.* at 349–78 (Thomas, J., concurring in part and dissenting in part)

265. *Id.* at 353 n.2 (Thomas, J., concurring in part and dissenting in part) (discussing *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986)).

266. See Byrne, *Special Concern*, *supra* note 21, at 264. Professor Charles Fried once thought that the Court or, at least, Justice O'Connor might extend the *Bakke* diversity rationale to elementary and secondary schools. "*Wygant* does not establish the contrary, given that the preferential program there was so crudely drawn that it could not possibly have met the further requirement of narrow tailoring." Charles Fried, *Forward: Revolutions?*, 109 HARV. L. REV. 13, 62 (1995).

267. *Grutter*, 539 U.S. at 362 (Thomas, J., concurring in part and dissenting in part).

268. *Id.* at 363.

269. See Byrne, *Special Concern*, *supra* note 21, at 257 (describing how academic freedom cases often employ stirring rhetoric without deciding much).

270. Jeffrey Rosen finds O'Connor's rhetoric more unequivocally affirmative in comparing it to the plurality opinion in *Planned Parenthood of S.E. Pa. v. Casey*. Jeffrey Rosen, *Light Footprint*, NEW REPUBLIC, July 7 & 14, 2003, at 16 (internal citations omitted):

[U]nlike her coy performance in reaffirming *Roe*, where she upheld the result without endorsing its reasoning, O'Connor made clear she agreed with the core holding of

What is involved in this case is the adjustment of competing constitutional concerns. Even if one grants that affirmative action raises serious concerns under the Equal Protection Clause, a competing First Amendment interest may justify its use. This reflects the familiar judicial technique of *balancing* in constitutional cases, an approach long associated with Justice Powell and going back at least as far as Justice Frankfurter. Balancing competing constitutional interests occurs often in academic freedom cases because university decision making not only is authorized by state law, but is protected by the Constitution. The peculiarity of this interest balancing in academic freedom cases is compounded by the unusual notion that a state university exists legally both as a state actor subject to constitutional restraint and as a holder of constitutional rights. This can be seen most clearly in *Regents of University of Michigan v. Ewing*,²⁷¹ where the decision not to recognize a substantive due process right to fair grading is supported materially by deference to academic decision making sanctioned by academic freedom.²⁷²

The nub of Justice Thomas's opinion in *Grutter* concerning academic freedom emerges in his mockery of the contention that a university might have a constitutional interest in employing selective admission standards.²⁷³ Of course, it is true that a school could achieve an ethnically diverse class by offering positions by lot among high school graduates.²⁷⁴ The Texas 10% scheme is a variant of admission by sample. But the decision to admit by employing criteria designed to enroll the students "best suited" to the education offered lies at the core of institutional academic freedom, because it will constitute the type of instruction and community intellectual life possible.²⁷⁵ This may be easier to see in regards to faculty: a decision by an institution to require faculty to have doctorate degrees may be excessively rigid, but the school needs the freedom to make that choice to promote a certain type of scholarship and teaching. Similarly, the decision of the University of Michigan Law School to admit only students with unusual intellectual credentials may leave out students who could profit from the education, but the school has a right to orient itself toward a particular intellectual or

Bakke—that universities have a compelling interest in the educational benefits that flow from diversity. To preserve the educational autonomy that the First Amendment protects, O'Connor concluded, judges should defer to the judgments of educators about how best to fulfill their educational mission.

271. 474 U.S. 214 (1985).

272. *Id.* at 226 n.12.

273. *Grutter v. Bollinger*, 539 U.S. 306, 360 (2003) (Thomas, J., concurring in part and dissenting in part). Justice Thomas's preliminary point that having a public law school in Michigan is not a compelling state interest misses the mark entirely. *Id.* at 357. That an academic institution has a right to make academic decisions does not require that anyone has the right to found an academic institution. His point is like claiming that I have no Fourth Amendment protection against searches of my home because I have no constitutional interest in having a house.

274. Justice Thomas simplifies and distorts the complex relationship between colleges and universities and high schools in establishing academic standards.

275. For a nuanced account of the justice of selective admissions, see FULLINWIDER & LICHTENBERG, *supra* note 249.

educational project.²⁷⁶ Sophisticated approaches to the law are more likely to develop and be critiqued in such a school than in one with only minimum standards. The point of academic freedom is that government officials are less likely to prize or effectively manage this socially valuable but tortuous development of understanding than are academics. Justice Thomas's rather impromptu populism proves this empirical observation likely to be true once again.

Justice Thomas makes some interesting subsidiary points. The attractive normative core to his position is his insistence that education for blacks should not be thought inferior ipso facto because of the absence of whites. But, the normative core of the Court's opinion more nearly is that education of whites should be thought inferior in the absence of other races. It may be true, as the studies he cites suggest, that historically and predominantly black colleges better serve some black students than do diverse schools.²⁷⁷ Justice Thomas seems to think that we would reject instinctively as discriminatory a legal claim, built on these premises, that a historically black school would have an academic freedom right to deny admission to white students on educational grounds.²⁷⁸ He wants to stress the unacceptable consequences of using race as a factor in admissions even if it has educational benefits.²⁷⁹

He is right to press this question. But his example may prove the opposite. If a historically black school could point to a plausible factual basis to believe that black students will learn better in a student body with few whites, and a court believed that this view was not substantially influenced by racial animosity toward whites (no small hurdles), academic freedom should help the school survive the strict scrutiny needed to find that its exclusions did not violate the Equal Protection Clause. The point of *Grutter* is that a limited use of race may be permissible if justified by a persuasive, or at least, plausible educational judgment. Where Justice Thomas's hypothetical would likely come afoul of the Constitution is on "narrow tailoring," the issue of how and to what extent a school can use race as a factor. A categorical exclusion of whites surely would fail, as *Gratz v. Bollinger*²⁸⁰ demonstrates. A historically black school should not be able to use race as an admissions factor more than necessary to achieve important educational benefits. Justice Thomas's argument ignores this constraint. In an example he uses, it strains credulity that a university currently only 5.4% white could show that it would realize additional educational benefits by reducing the number of whites.²⁸¹

276. Justice Thomas is quite right that the dispute in *Grutter* arises from the use of highly selective admissions criteria, which the great majority of higher education institutions do not employ. For preserving access to higher education for minorities and all lower income Americans, it is even more important that government preserve the affordability of these valuable institutions, most of which are public. See Kermit L. Hall, *The Biggest Barrier to College Isn't Race*, CHRON. HIGHER EDUC., June 20, 2003, at B20; Greg Winter, *As State Colleges Cut Classes, Students Struggle to Finish*, N.Y. TIMES, Aug. 24, 2003, at A1; Elizabeth Farelle, *Public-College Tuition Rise is Largest in Three Decades*, CHRON. HIGHER EDUC., Oct. 31, 2003, at A1.

277. *Grutter*, 539 U.S. at 364–65.

278. *Id.* at 365–66.

279. *Id.*

280. 539 U.S. 244 (2003).

281. *Grutter*, 539 U.S. at 356 n.7 (Thomas, J., concurring in part and dissenting in part).

One could imagine the further claim that an all-white school would have distinct educational benefits. Indeed such views were once pervasive, but that claim stands condemned by history both as based upon raw prejudice and having fostered a scholarly ideology of subordination.²⁸² One might condemn per se any exclusion of or cap on a minority race or ethnic group by a majority as prejudicial, but the different histories of whites and blacks in the United States make it impossible to treat as morally or constitutionally identical discrimination by blacks against whites as discrimination by whites against blacks. In any event, official support for the perpetuation of historically black institutions contrasts dramatically with official pressure to end the racially identifiable character of historically white schools, and the difference is justified when acknowledged by the educational advantage historically black schools offer black students. What is difficult in *Grutter* is to distinguish the specifically educational benefits from diverse student bodies from the general social benefits that the Court says universities may not rely upon.

Justice Thomas scores his most direct hit in contrasting the deference to educational judgments in *Grutter* with the absence of deference in the Virginia Military Institute ("VMI") case, where the Court held that admitting only men violated the Equal Protection clause.²⁸³ VMI had defended its exclusion of women on the ground that their presence would impair its "adversative" educational method, but the Court thought the problems manageable.²⁸⁴ Justice Thomas must be right to some extent in viewing the distinction between the cases as the admissions policy of an elite law school and that of a Southern military school, although it might better be said that the intellectual ambitions of the former are closer to the values of academic freedom than the "character building" or inculcative goals of the latter. Nonetheless, the Court has failed to take seriously the educational benefits of separate single sex education even though they appear plausible, at least in some contexts. The Court should have addressed these issues more cautiously. This may be because members of the Court have yet to see a case where they believe that exclusion of one gender can be disentangled from traditional gender stereotypes. While the single-sex university precedents are not encouraging, it would be interesting to see what the Court would do with a program more easily disentangled from stereotypes—an all-female engineering program, for example.

Grutter does establish the importance of institutional academic freedom as a constitutional interest. The constitutional status of the deference paid to good faith academic decision making performs strenuous work in meeting the test of providing a compelling state interest. The logic of the Court's doctrinal argument requires that academic freedom have this significance, even if Justice O'Connor's opinion only stingily gives it rhetorical support. Justice Thomas's dissent shows how alarming a constitutional law that ignored institutional academic freedom

282. See Charles R. Lawrence, *Two Views of the River: A Critique of the Liberal Defense of Affirmative Action*, 101 COLUM. L. REV. 928 (2001).

283. *Grutter*, 539 U.S. at 366 (Thomas, J., concurring in part and dissenting in part) (discussing *United States v. Virginia*, 518 U.S. 515 (1996)).

284. *United States v. Virginia*, 518 U.S. 515, 540–43. Virginia also failed to show that its female-only alternative provided an "equal" if separate educational opportunity.

would be, exposing the intellectual aspirations of universities to unchecked political meddling. Thomas also shows the extent to which the Court has failed to come to grips with the implications of institutional academic freedom in dealing with relatively easy claims of discrimination.

Supporters of college and university interests must be heartened by *Grutter*, but should by no means be complacent. The decision makes academic freedom far more doctrinally secure and should materially strengthen arguments to lower court judges that they should defer to good faith academic decision making, even in the face of claims by individuals that require articulation of a compelling interest. Yet, it would be naive not to suspect that the university prevailed in *Grutter* more because its views accorded with those of a majority of the Court or at least made sense to them rather than because of a new consensus about the constitutional importance of deference to schools' educational judgments. As I argue below, courts' embrace of institutional academic freedom may be nourished more by confidence in the motives of college and university leaders than by the logic of First Amendment doctrine. While *Grutter* can provide a foundation for a reinvigorated notion of academic freedom, whether it does so will depend both on how well colleges and universities perform in the eyes of the educated public and how well they argue their legal positions.

III. THE SOCIAL CONTEXT OF CONSTITUTIONAL ACADEMIC FREEDOM

A. Causes of Decline

It is difficult to explain the erosion of constitutional recognition of academic freedom before *Grutter* using only lawyers' tools. One cannot discount the extent to which the prevailing doctrine, which could be characterized either as vague or subtle, confuses judges who lack an understanding of the academic context and values. Judicial decisions often seem the result of purposeful misreadings driven by larger concerns. In this section, I attempt to portray those larger concerns, reflecting on changes both in higher education and in the larger society that offer the most persuasive explanation for the waning of constitutional academic freedom.

1. The cases discussed above illustrate what we know from many sources: the issues that drove disputes about the nature of academic speech concerned race, ethnicity, and gender. During the 1970s and 1980s, the absolute number of students of color and female students increased dramatically. Black students increased from 227,000 in 1960²⁸⁵ to 1,393,000 in 1990.²⁸⁶ They also increased relative to rapidly increasing numbers of white students, being outnumbered by

285. U.S. BUREAU OF THE CENSUS, U.S. DEP'T. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 1982-83 at table 261, available at http://www2.census.gov/prod2/statcomp/documents/1982_83-01.pdf [hereinafter STATISTICAL ABSTRACT 1982-83].

286. U.S. BUREAU OF THE CENSUS, U.S. DEP'T. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 2000 at table 301, available at <http://www.census.gov/prod/2001pubs/statab/sec04.pdf> [hereinafter STATISTICAL ABSTRACT 2000].

fifteen to one in 1960,²⁸⁷ but only by eight to one in 1990.²⁸⁸ Female students became a gender majority, growing from 34% in 1960²⁸⁹ to 54% in 1990.²⁹⁰ During the same period, faculty also became far more diverse.²⁹¹

The nation's colleges and universities played a unique role during this time in creating a freely choosing, integrated society of articulate equals within a large culture still quite segregated in residence, work, and religion. Higher education often provided both white and black students with their first experiences of an integrated environment. Moreover, it was one in which they were expected to be critical of inherited truths, while establishing their own identities and competing for credentials to take into the job market. Within this context, it is hardly surprising that there was conflict that focused on race. What is striking is that the conflict was so circumscribed.

The shape of these changes also is suggestive. Faculty of color and women often found positions more promptly in new study programs or departments devoted to race or gender than in traditional disciplines. Even within established departments, minority faculty disproportionately concerned themselves with formerly undervalued concerns of their group or sex. Thus, issues of integration or demographic diversity have persistently been intertwined with issues of intellectual agenda and status. The merits of ideas concerning the relative centrality of race and gender have had, and been seen to have, power consequences for individual careers and for the direction of the higher education itself. It is surprising neither that many contemporary scholars chose to bend study and teaching agendas toward issues of interest to them nor that others resisted the change.

To some extent, the change in tone on campus created by the presence of so many minorities and women meant that it became impolite to casually disparage or mock them when it had been common beforehand. Many charges about "political correctness" stem from open complaints by female or minority students about statements made by white men, rather than by institutional actions.²⁹² In other words, the protest focused on a challenge to the propriety of someone's speech by

287. STATISTICAL ABSTRACT 1982-83, *supra* note 285, at table 261.

288. STATISTICAL ABSTRACT 2000, *supra* note 286, at table 301.

289. STATISTICAL ABSTRACT 1982-83, *supra* note 285, at table 261.

290. STATISTICAL ABSTRACT 2000, *supra* note 286, at table 301. The Department of Education reported that the number of black undergraduate students enrolled rose by more than 500,000 from 1990 to 2001, when the total was 1,657,100. *Almanac*, CHRON. HIGHER EDUC., Aug. 27, 2004 at 16. The number of Hispanic undergraduates doubled during the same period to 1,440,400. *Id.* The number of white undergraduates was static during the same period. *Id.*

291. Assessments of the gender and racial composition of faculty at post-secondary institutions earlier than 1985 actually is hard to come by. By 1985, women constituted 27.6% of full-time faculty in higher education, and racial minorities constituted 9.9%. DEBORAH J. WILDS, AM. COUNCIL ON EDUC., MINORITIES IN HIGHER EDUC. 1999-2000, SEVENTEENTH ANNUAL STATUS REPORT 98 TABLE 20 (2000). NCES's most recent study, for the fall of 2001, reports that women constitute 38.4% of full-time faculty, and minorities, 14.7%. E.D. TAGS, NAT'L CTR. FOR EDUC. STATISTICS, STAFF IN POSTSECONDARY INSTITUTIONS, FALL 2001, AND SALARIES OF FULL-TIME INSTRUCTIONAL FACULTY, 2001-02 5 Table e (Nov. 2003), available at <http://nces.ed.gov/pubs2004/2004159.pdf>.

292. Mark Tushnet insightfully analyzed this phenomenon in *Political Correctness, the Law, and the Legal Academy*, 4 YALE J.L. & HUMAN. 127, 150-52 (1992).

others at the same or lower level of power within an academic community. The sense of correctness in speech has come primarily from informal disapproval and reflects a change in mores rather than from an institutional striving for conformity. While such changes in what language is socially acceptable can inhibit legitimate debate about important issues, at least until the changes in etiquette become naturalized, it is hardly a loss for intellectual life generally that racist or sexist slurs or jokes have become solecisms.²⁹³

2. These changes occurred during a period of skepticism about the neutrality of truth criteria within disciplines. Academic freedom depends on the assumption that scholars can separate truth from falsehood using disciplinary methods and criteria. The 1950s appear to have been a time of unusual consensus in many disciplines about how serious work ought to proceed.²⁹⁴ The tumults of the civil rights era and the Vietnam War called forth many criticisms and new perspectives, but the entrance of that generation into faculty ranks led to more theoretic questioning of the assumptions of disciplines. Some fields, like English, where the disciplinary consensus about the canon or the nature of literature had relatively shallow philosophical foundations, ruptured.²⁹⁵

These changes borrowed from a more radical philosophical questioning of the nature of truth. Foucault, perhaps, articulated most forcefully that apparently neutral systems of knowledge may actually represent structures of social and political power.²⁹⁶ Contemporary anthropology, too, assaulted inherited notions of

293. Byrne, *supra* note 60, at 419.

294. Conservatives were not so happy at the time about developments in higher education and wrote elegies for declining standards. Russell Kirk, the thoughtful and independent traditional conservative, wrote a column on higher education in the *National Review* throughout the 1950s. He wrote, "By 1953, at possibly the majority of American institutions of higher learning, the process of lowering standards was well advanced." RUSSELL KIRK, *DECADENCE AND RENEWAL IN THE HIGHER LEARNING* 5 (1978). See also WILLIAM F. BUCKLEY, JR., *GOD AND MAN AT YALE: THE SUPERSTITIONS OF "ACADEMIC FREEDOM"* (1951). Buckley's youthful polemic against how Yale faculty undermine belief in Christianity and individualism still sizzles on the page. He more clearly states the significance of ideological battles over higher education than most of his successors:

I consider this battle of educational theory important and worth time and thought even in the context of a world-situation that seems to render totally irrelevant any fight except the power struggle against Communism. I myself believe that the duel between Christianity and atheism is the most important in the world. I further believe that the struggle between individualism and collectivism is the same struggle reproduced on another level. I believe that if and when the menace of Communism is gone, other vital battles, at present subordinated, will emerge to the foreground. And the winner must have help from the classroom.

Id. at xvi-xvii.

It is interesting to note that Buckley thought the problem of professors who scoffed at religion should be addressed by the board and alumni requiring adherence to Christian orthodoxy, surely a form of "religious correctness," while his successors bristle at any corporate standards of speech, even when adopted by the faculty.

295. See GERALD GRAFF, *PROFESSING LITERATURE: AN INSTITUTIONAL HISTORY* (1987).

296. The influence of Foucault in radical legal thought is stressed in DANIEL A. FARBER & SUZANNE SHERRY, *BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW* 22-24 (1997).

universal truths in favor of contextual meaning within cultural groups.²⁹⁷ Richard Rorty argued that, since we can never grasp the world as it is or represent it in our language, we should strive for progressive consensus.²⁹⁸ Debates about these issues were extended through the humanities and, to a lesser extent, the social sciences.

In this context, debate about scholarly approaches could easily be understood as a struggle for political control. Arguments could seem out of bounds, because the bounds were shifting and contested. Also, extreme claims and rhetoric could claim sanction under some perspective, the dismissal of which could be attacked as politically motivated. In short, scholarly discourse could collapse into politics, even though academic freedom and the status of the professoriate both arose from an earlier effective distinction between them. Many academics experienced these struggles painfully as “intolerance.”²⁹⁹

Moreover, extreme claims about the ability of scholarship to make meaningful claims about the external world undermine the justifications for academic freedom at all. The 1915 Declaration based protection for the college or university on the conditions needed for scholars to improve knowledge.³⁰⁰ If scholarship is understood merely as a witty shadow play, then the justification for professors’ autonomy from those who pay the bills is seriously undermined. Richard Rorty or Stanley Fish might believe that academic freedom would continue as a practice, even without claims that it furthered inquiry about the truth, because it created useful conditions for academic work and is imbedded in well-protected institutional arrangements.³⁰¹

But it seems likely that such institutional arrangements will and, perhaps, should decay without the animating vitality of hard truth as a goal and test for academic discourse. The absence of truth as a criterion for scholarship would seem inevitably to license speech in the service of interests, including self-interest, and even deceit; the epistemic and ethical seem to require mutual support. Moreover, dispensing with truth as such would fatally weaken the claims that academics can make to the wider world for a respect and forbearance not shown other professional groups. Professor Rabban warned, “People who depend on academic freedom, including the antirealists themselves, may be fortunate that the denial of any correspondence between scholarship and an external world beyond intersubjectivity has failed to attract popular support.”³⁰² Moreover, the public would be right to reject an academy that offers scholarship only as the consensus

297. See CLIFFORD GEERTZ, *LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY* 20–35 (1983).

298. See RICHARD RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* 333–42 (1980).

299. Professor Neil Hamilton gives a moving, first person account of how the experience of accusation prompted his analysis of parallels to the McCarthy period in HAMILTON, *supra* note 99, at xi–xvi.

300. See 1915 Declaration, *supra* note 23, at 393.

301. See Richard Rorty, *Does Academic Freedom Have Philosophical Presuppositions?* in *THE FUTURE OF ACADEMIC FREEDOM* 21–42 (Louis Menand ed. 1996); STANLEY FISH, *THERE’S NO SUCH THING AS FREE SPEECH* 102 (1994).

302. David Rabban, *Can Academic Freedom Survive Postmodernism?*, 86 CAL. L. REV. 1377, 1389 (1998).

of those with good political views, at least to the extent that the public is hostile or indifferent to the political concerns of those academics who concur. But it is in the interests of everyone to provide answers to questions that are true, or truer than those previously accepted.

But all this argument about the nature of knowledge has itself been an academic episode. Scholars continue routinely to debate theories against evidence. Indeed, as has often been pointed out, relativists routinely invoke the very stance of objectivity that they claim to be illusory, arguing that their accounts of "truth" are truer than those they criticize.³⁰³ The practices of academic discourse that measure the worth of disciplinary assertions by the extent to which they provide an objectively superior account of interesting phenomena, something more true than previously asserted, seems to have survived quite intact.³⁰⁴ How can coherent discussion and debate survive without these assumptions? Controversy about the nature of knowledge has fostered some welcome humility about the application of scientific methods to the study of nature, as well as to values, meaning, and human agency, and a broader recognition that interpretations of human events will often reflect the situation of the interpreter.³⁰⁵ The effort to use reason and evidence to

303. See, e.g., THOMAS NAGEL, *THE LAST WORD* 15 (1997):

The familiar point that relativism is self-refuting remains valid in spite of its familiarity: We cannot criticize some of our own claims of reason without employing reason at some other point to formulate and support those criticisms. This may result in shrinkage of the domain of rationally defensible judgments, but not its disappearance.

304. Some thoroughgoing relativists, such as Stanley Fish, argue that these practices continue as a matter of organizational behavior and political control. See Fish, *supra* note 301, at 102. But we need not content ourselves with so little. Professor Michael Williams, for example, argues for a contextualist theory of knowledge, which recognizes that knowledge arises in community endeavors, like academic disciplines, the methodology of which both gives criteria and can be challenged. MICHAEL WILLIAMS, *PROBLEMS OF KNOWLEDGE: A CRITICAL INTRODUCTION TO EPISTEMOLOGY* 159–70 (2001). He does not view the dependence on unchallengeable criteria as relegating us to relativism. He writes:

A contextualist view of knowledge and justification does not commit one to holding that a reference to context is part of the *content* of a knowledge-claim A knowledge-claim commits one to holding that all significant potential defeaters—possibilities which, if realized, would make one's belief either false or inadequately grounded—have been eliminated; the contextual element comes in to fix what defeaters should be counted significant. But presuppositions as to what is significant are themselves open to criticism, which can be informationally or economically triggered Recontextualization can go on indefinitely. But this is the open endedness of inquiry, not a vicious regress of justification.

Id. at 226–27. Williams tellingly criticizes relativists for requiring that epistemological accounts of knowledge stand on unquestionable "foundations." "In effect, the relativist accepts the foundationalist picture of the structure of knowledge while denying that there are any (or enough) foundational elements that are universally valid Relativism, we might say, is pluralistic foundationalism." *Id.* at 224.

305. See Bernard Williams, Online Chat, *GUARDIAN UNLIMITED* online newspaper (Nov. 12, 2002), at <http://educationtalk.guardian.co.uk/WebX?14@201.RrLiadYjipH.0@.3ba77186/61> (last visited Oct. 12, 2004). Bernard Williams wrote in response to an online question:

In one sense, changing truths are themselves absolute—if it is true that it is raining in Oxford today then it will always be true that it was raining in Oxford on November 12, 2002. However, if you mean absolute TRUTH as meaning one absolute truth about the universe, I doubt there is such a thing. On my view being honest is part of being

make assertions that are true objectively, and the ethical necessity of doing so, in fact exposes academic assertion to criticism on the grounds that they are false or inadequate in some important way.³⁰⁶ Faith in the value of reason does not require certainty about its fruits.

Extreme relativism has garnered few adherents among professional philosophers.³⁰⁷ A wide range of "pragmatist" understandings of knowledge are, of course, entirely consistent with the values of scholarly inquiry and academic freedom. Michael Williams, for example, argues, "Finding theories that 'work is a way of finding theories that are true (as far as we can tell), not the other way around.'" ³⁰⁸ It seems wrong to suppose that the founders of the AAUP entertained a naive correspondence theory of knowledge, which now exploded, leaves their notion of academic freedom without any foundation. Debate about the meaning and content of knowledge has pervaded philosophy for a very long time.³⁰⁹ John Dewey, the greatest of American pragmatists, after all, founded the AAUP.³¹⁰ Alan Ryan argues that "nothing at all follows about academic freedom from our espousing an objectivist or pragmatist view of truth."³¹¹ He seems right, so long as truth does not "drop out" of pragmatist accounts, allowing consensus to be founded on criteria of truth, and not just on the convenient or desirable.

Moreover, the debates about postmodernism have called forth nuanced and persuasive accounts of how scholarship relates to the world as it is and must abide by a criterion of truthfulness.³¹² For example, the philosopher Bernard Williams recently published a subtle, extended study of the virtue of truth particularly in

truthful: the other part consists in trying to make sure you are right.

Id.

306. Michael Williams makes this point well in interpreting Thomas Kuhn's *The Structure of Scientific Revolutions* (1962), in which descriptions of "paradigm shifts" in the history of science have sometimes been taken to be dictated more by sociological than intellectual influences:

On Kuhn's model, science works because, as an institution, it has managed to strike a delicate balance between freedom and constraint, and because its procedures, however theoretically mediated, involve interactions with nature that we do not fully control. Normal-scientific research is what throws up the anomalies that eventually provoke theoretical advance.

WILLIAMS, *supra* note 304, at 233.

307. MARTHA C. NUSSBAUM, *CULTIVATING HUMANITY* 41 (1997):

Postmodernists do not justify their more extreme conclusions with compelling arguments. Nor do they even grapple with the technical issues about physics and language that any modern account of these matters needs to confront. For this reason, their influence has been relatively slight in philosophy, where far more nuanced accounts of these matters abound.

308. WILLIAMS, *supra* note 304, at 239.

309. The American tradition is described and the causes discussed in BRUCE KUKLICK, *A HISTORY OF PHILOSOPHY IN AMERICA, 1720-2000* (2001).

310. Dewey was emphatic that experts in a field rather than any interested persons had to maintain standards of a discipline. See John Dewey, *Academic Freedom*, 23 *EDU. REV.* 1, 4-5 (1902).

311. ALAN RYAN, *LIBERAL ANXIETIES AND LIBERAL EDUCATION* 158 (1998).

312. Lawyers might find particularly interesting Ronald Dworkin, *Objectivity and Truth: You'd Better Believe It*, 25 *PHIL. & PUB. AFF.* 87 (1996), wherein Dworkin argues that moral assertions must be objective by their nature, or linguistic structure, and would be incoherent as statements of preferences.

intellectual work, which accounts for how historical interpretation both makes sense of the past for a situated “we” and is bounded by truth both as to facts and as to the credible explanations for changes in human life.³¹³ Williams conceives of truth as an intrinsic value, arising from basic human needs for cooperation, and analyzes it in terms of its constituent virtues of “Sincerity” and “Accuracy.”³¹⁴ For Williams, a robust commitment to truth is necessary for us to even know what we think.³¹⁵ Such work enables scholars to consciously understand the difficult challenges of academic work and explain its value to citizens.³¹⁶

Given the long history of epistemological struggle, it is unlikely that skepticism as such was responsible for the anxiety associated with post-modernism. It seems more likely that the anxiety reflected an estrangement of professional norms from those of the wider society or a loss of belief that knowledge would aid society. The comedy of David Lodge’s *Small World*³¹⁷ may capture the period more richly. Louis Menand described the deal struck in academic freedom:

The deal they offered was that in return for exemption from ordinary market conditions, professors would commit themselves to the unselfish and disinterested pursuit of truth. Implicit in the argument they made was that the public—though supposedly the real “owners” of universities—would abstain from interference in university affairs out of its own self-interest. . . . And the most remarkable thing about this deal was that American society—with, to be sure, many reservations and regrets along the way—bought it.³¹⁸

The anxieties associated with post-modernism may have more to do with a loss

313. BERNARD WILLIAMS, TRUTH AND TRUTHFULNESS 149–71, 233–69 (2002). See also WILLIAMS, *supra* note 304, at 125 (“[E]pistemological arguments are irreducibly normative: justification involves entitlement, responsibility, and adequate grounding. Standards of responsibility and adequacy are not fixed by nature: they are fixed by us in the light of our interest, projects, and assessment of our situation.”).

314. See WILLIAMS, *supra* note 304, at 125.

315. *Id.*

316. Bernard Williams associates the virtue of sincerity in making assertions with the nurturing of trust within a relevant community and accuracy with overcoming internal and external obstacles to getting our observations right. He writes of accuracy:

Self-conscious pursuit of the truth requires resistance to such things as self-deception and wishful thinking, and one component of the virtue of accuracy—which, again, is why it is a virtue and not merely a disposition of reliability—lies in the skills and attitudes that resist the pleasure principle, in all its forms, from a gross need to believe the agreeable, to mere laziness in checking one’s investigations. The virtues of accuracy include, very importantly, dispositions and strategies for sustaining the defenses of belief against wish, and against one of the products of wish, self-deception.

BERNARD WILLIAMS, *supra* note 313, at 125.

317. Morris Zapp, Lodge’s jaunty post-structuralist literary critic replies to anguished concern about whether interpretation has any point if it cannot find meaning in literature:

The point, of course, is to uphold the institution of academic literary studies. We maintain our position in society by performing a certain ritual, just like any other group of workers in the realm of discourse—lawyers, politicians, journalists. And as it looks as if we have done our duty for today, shall we adjourn for a drink?

DAVID LODGE, *SMALL WORLD* 33 (Warner paperback ed. 1984).

318. LOUIS MENAND, *THE METAPHYSICAL CLUB* 417 (2001).

of faith by some scholars that their work would improve the conditions of society or their students than to epistemology.

3. College and university efforts to welcome or assimilate increased numbers of students of color occurred within a revival among student affairs professionals of *in loco parentis*. Before the 1960s, and, even more so, before the great influx of older students under the GI Bill, colleges and universities had seen themselves responsible for the development of the young people resident on their campuses.³¹⁹ This generally took the form of policing for alcohol and sexual relations, as well as some kinds of religious observation, even in state schools. One immediate consequence of the sixties was a prompt withdrawal of such supervision and requirements. For a period, colleges and universities saw their students as autonomous adults who would make their own choices as they saw fit.

By the 1980s, this tide had begun to turn again. Many colleges and universities began to try to instruct their student bodies about alcohol and drug abuse. Concerns about sexually transmitted diseases and then AIDS caused schools to offer guidance on "safe sex" and responsibility toward others. Counseling for stress and anxiety became commonly available services. Finally, schools began requiring or encouraging service to the community. These initiatives largely occurred outside the curriculum. They instituted a regimen of personal development based on "health" and "service" that resembled earlier approaches to character formation based overtly on morality.³²⁰

Many of the approaches to fostering multiculturalism within colleges and universities were mediated by student affairs professionals steeped in this emerging revival of *in loco parentis*.³²¹ Thus, schools' attempts to deal with race and gender took on the attributes of their other services. Minority students and women were made comfortable by "centers" and special deans, as well as by protection against racist and sexist insults.³²² Students expressing racist attitudes in speech and behavior were encouraged or required to admit that they had a problem and seek help, not unlike students who abused alcohol.

While such approaches could sometimes seem absurd or threatening to the independence of individuals, they should not be dismissed as meddling. Colleges' and universities' attempts to provide guidance for living to their students reflect traditional values for fostering wholesome personal development within residential institutions and respond to real needs not otherwise met in a consumer driven culture. However, these therapeutic efforts too often lacked substantial faculty involvement and often failed to give scope to the intellectual and educational traditions of the institutions. Many of the cases where college and university

319. See Byrne, *supra* note 60, at 427 n.124.

320. See, e.g., DEREK BOK, *HIGHER LEARNING* 49-52 (1986). While I wrote this, the hallways at my law school were plastered with signs urging us to use the stairs rather than the elevator in order to be healthy.

321. Indeed, perhaps the most significant change in higher education since the 1960s has been the increase in the size and scope of tasks undertaken by school administrative staffs. Alan Ryan has written that modern administrators provide "a sort of student welfare state." RYAN, *supra* note 316, at 173. One should be dubious about the extent to which university decision making, when made by non-academic administrators, actually rests on academic grounds.

322. See *id.*

actions impinge most alarmingly on free speech involve choices made by non-faculty administrators. For example, the interpretive guide for the University of Michigan's speech code, which indicated that students might be subject to discipline if they failed to invite a gay student to a party or laughed at a classmate who stuttered, was prepared by the university's affirmative action office.³²³ Similarly, the AAUP's critique of the University of New Hampshire's punishment of Professor Don Silva emphasizes that the absence of faculty perspective and participation in enforcing sexual harassment policies leads to too little concern for academic freedom.³²⁴

4. Denunciations of these developments as a wave of "political correctness" reflect one of the interesting cultural phenomena of recent years which will provide a rich lode for future historians. Books and articles tumbled from the presses competing to denounce in the most hysterical tones attempts within colleges and universities to revise curricula or create speech norms for a newly multicultural environment of uncertain depth.³²⁵ Some of these initiatives, of course, demanded criticism and invited satire. But one cannot but be impressed by the apocalyptic tone and violent rhetoric of the anti-politically correct crusaders.³²⁶

What was going on here? After all, virtually no one contests that American higher education is the finest in the world, in part because it provides freedom of expression and flexibility of institutional arrangement to students and faculty to a degree unmatched by any other existing system of higher education.³²⁷ Students and faculty flock here from all corners of the world.³²⁸ Demand for admission to these supposed temples of intolerance has never been keener. Graduates donate more money to support their successors than at any time in the history of the

323. *Doe v. Univ. of Mich.*, 721 F. Supp. 852, 857-58 (E.D. Mich. 1989). Then-Michigan President Lee Bollinger later disclaimed the propriety of the Michigan rules struck down in *Doe*. Lee C. Bollinger, *The Open Minded Soldier and the University*, in UNFETTERED EXPRESSION: FREEDOM IN AMERICAN INTELLECTUAL LIFE 34 (Peggie J. Hollingsworth ed., 2000).

324. See *supra* text accompanying notes 115-120. At Georgetown, I have served for years on a Speech and Expression Committee, containing students, administrators and four experienced professors.

325. See, e.g., David Horowitz, *Leftwing Fascism and the American Dream*, 22 WM. MITCHELL L. REV. 467, 471 (1996) ("The attack on individualism, the decentering of the individual, the elevation of group claims over individual rights, the cult of irrationality and ethnicity (including gender and sex 'ethnicity')—this is the current orthodoxy of the academy.").

326. See, e.g., Dinesh D'Souza, ILLIBERAL EDUCATION 13, 15, 229 (1991):

[A]n academic and cultural revolution is under way at American universities These revolutionaries inhabit the offices of presidents, provosts, deans, and other administrators [B]y precept and example, universities have taught [students] that 'all rules are unjust' and 'all preferences are principled'; that justice is simply the will of the stronger party; that standards and values are arbitrary, and the ideal of the educated person is largely a figment of bourgeois white male ideology, which should be cast aside; that individual rights are a red flag for signaling social privilege . . . that debates are best conducted . . . by accusation, intimidation, and official prosecution

327. See RYAN, *supra* note 311, at 148 ("More students than ever are getting what is at present the best undergraduate education in the world.").

328. One Spanish graduate student, for example, hopes to teach in America because in Spain "the university is very politicized." Vivian Marx, *Europe Tries to Attract a New Generation of Academics*, CHRON. HIGHER EDUC., MARCH 8, 2002, at A40, A42.

world.³²⁹ By every measure, American higher education, for all its problems, is, and is acknowledged to be, a success.

Lawrence Levine seems on the mark in finding Richard Hofstadter's classic essay on the "paranoid style" to be indispensable for understanding the hysteria of the denunciations.³³⁰ Rereading many of these crusaders against "political correctness" certainly brings to mind Hofstadter's portrait of a persistent style of political critique in American life:

The central image is that of a vast and sinister conspiracy, gigantic and yet subtle machinery of influence set in motion to undermine and destroy a way of life The paranoid spokesman sees the fate of this conspiracy in apocalyptic terms—he traffics in the birth and death of whole worlds, whole political orders, whole systems of human values. He is always manning the barricades of civilization. He constantly lives at a turning point: it is now or never in organizing resistance to conspiracy Since what is at stake is always a conflict between absolute good and absolute evil, the quality needed is not a willingness to compromise but the will to fight things out to a finish.³³¹

Hofstadter also argues that the paranoid style may be stimulated when exponents of a viewpoint feel excluded from power: "Feeling that they have no access to political bargaining or the making of decisions, they find their original conception of the world of power as omnipotent, sinister, and malicious fully confirmed."³³² Certainly, the complainants against speech regulation frequently bewailed that college and university power was in the hands of a liberal elite that ignored their concerns.

Although Levine offers a helpful response to the political correctness critics about curricular matters, particularly in showing how few actually understand the developments they decry, his praises of contemporary approaches to humanities only constitute one side of a multi-dimensional debate about education and scholarship that pervades faculties outside the hard sciences.³³³ Such debate will continue beyond our time and must be left alone by political and judicial authorities. Unfortunately, he has little to say about college and university regulation of offensive speech, other than calling them "a stumbling attempt to adapt" to the new ethnic and gender diversity on campuses.³³⁴ This seems fair so long as one acknowledges that there have been excesses that point to the need for some colleges and universities to assert the primacy of reasoned debate as the center of intellectual life.

Still, the main impression from reading judicial decisions has been the banality of the utterances that have been at issue. Speakers have been prosecuted for using inflammatory or vulgar words and epithets, not for advancing theories either of the

329. See COUNCIL FOR AID TO EDUC., VOLUNTARY SUPPORT OF EDUCATION (2003).

330. LAWRENCE W. LEVINE, THE OPENING OF THE AMERICAN MIND 30–31 (1996).

331. RICHARD HOFSTADTER, THE PARANOID STYLE IN AMERICAN POLITICS AND OTHER ESSAYS 29–31 (1965).

332. *Id.* at 39.

333. LEVINE, *supra* note 330, at 29–30.

334. *Id.* at 28.

right or the left. Putting forward Don Silva or Dean Cohen as a martyr for intellectual freedom is no more persuasive than offering the current Prince of Wales as an epitome of the divine right of kings. No one is persecuting the serious exposition of ideas.

5. The demise of constitutional academic freedom reflects, above all, a loss of confidence by the judiciary in the wisdom of academic leaders. To some extent, this reflects changes in the outlook of judicial conservatism. Conservative theory in the 1950s emphasized deference to established non-governmental leaders. Conservatism has become more populist and more "liberal" in the economic sense. More recently, it embraces judicial control over organs of civil authority. This judicial inclination is further stimulated by the sense that college and university faculty adhere to social values substantially to the left of the judiciary, although this has probably been true since the beginning of the twentieth century.

But study of these cases does not indicate conservative judges playing a more conspicuous role in undermining academic freedom than liberal judges (except in the area of affirmative action in admissions). Indeed, liberal judges have insisted on the personal nature of free speech rights of both faculty and students against the college or university and have seemed at times to view academic grounds for limiting the scope of such freedoms as hocus pocus. Judge Reinhardt and Judge Cabranes plainly envisioned roles for themselves in resolving intra-university speech disputes by elaborating general free speech doctrine, based on their distrust of university decision makers.³³⁵ Indeed, a theme of this article is that judicial enforcement of the civil notion of freedom of speech against colleges and universities today represents a specific external threat to academic freedom.

It is striking that the judges who have contributed the most to creating a doctrine of institutional academic freedom have been centrists, concerned for some balance of freedom and order: Justices Frankfurter, Powell, Stevens, and Souter.³³⁶ These justices share a regard for learning, appreciation for the complexity of institutional arrangements, and skepticism about judicial lawmaking. They seem united in the understanding that for free scholarship to flourish, academic judgments about the quality of speech must be made, and that the freedom of the institution to exercise this function precludes political leaders from insisting that current popular ideologies be followed and civil libertarians from insisting that every person has an equal right to speak as he or she may wish.

Finally, judicial skepticism about academic freedom reflects a loss of confidence in self-government by professionals generally. Academic freedom does depend on viewing the professor as a professional needing a type of

335. *Brown v. Li*, 308 F.3d 908, 956 (9th Cir. 2002) (Reinhardt, J., dissenting); *Vega v. Miller*, 273 F.3d 460, 480 (2d Cir. 2001) (Cabranes, J., dissenting).

336. See *Sweezy v. New Hampshire*, 354 U.S. 234, 255 (1957) (Frankfurter, J., concurring); *Bd. of Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (Powell, J.); *Widmar v. Vincent*, 454 U.S. 263, 277 (1981) (Stevens, J., dissenting); *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 228 (1985) (Powell, J., concurring); *Bd. of Regents of the Univ. of Wisc. Sys. v. Southworth*, 529 U.S. 217, 236 (2000) (Souter, J., concurring). Chief Justice Warren and Justice Brennan get honorable mention; they coined powerful rhetoric even if they did not write opinions building a distinctive doctrine of academic freedom. See *Sweezy*, 354 U.S. 234 (1957) (Warren, C.J.); *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967) (Brennan, J.).

autonomy to make guild rules apart from popular control to achieve her professional goals. The courts have tolerated far less of this autonomy in the last twenty-five years. The First Amendment and antitrust laws have invalidated fee fixing and bans on advertising claimed to be necessary to preserve professional standards of lawyers, architects, engineers, and doctors.³³⁷ These decisions can be read to indicate that the value of any such professional practices have less social value than individual liberty or democratic control. What is surprising is not that courts may now be cutting down the claims of professors as they have done to other professionals before them, but that until recently professors seemed to be bucking the trend and finding a new constitutional foundation to elude legal control.³³⁸

Colleges and universities enjoyed nearly complete autonomy from legal regulation before the 1950s, being seen as a different realm, akin to a religion or the family, more than the marketplace. Beginning in the McCarthy era, a time of rapid growth in the size and scope of higher education, the Court began to articulate a constitutional rationale for continued deference.³³⁹ As other professional organizations came under greater legal oversight, however, it has become ever more necessary to articulate and defend the separateness of higher education. Yet it also has become more difficult. Colleges and universities themselves have embraced more non-academic values, vast quantities of research funded from outside, massive federal student loan policies, ever more garish athletic entertainments, valuable licensing of intellectual property, and the sense that members of the community have constitutional rights against the community.³⁴⁰

Given this erosion of image, broad changes in social power, and evolution of the institutions themselves, is institutional academic freedom a desirable principle in American constitutional law? Is it worth contending for? My response is an emphatic "Yes," although success requires some agreement about the goals of higher education, something rarely attained except at altitudes of meaningless abstraction. In the next section, I offer a few preliminary thoughts about what a principled institutional academic freedom might be for the future and how it might be supported.

337. See, e.g., *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 692-94 (1978) (holding that price fixing by engineers violates antitrust laws); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 381-83 (1977) (stating that total ban on attorney advertising violates the First Amendment).

338. Universities are subject to the antitrust laws, at least in activities not within the core academic freedom. *Nat'l Coll. Athletic Ass'n v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 98-99 (1984) (holding that NCAA's plan to restrict the total number of live televised college football games violates Sherman Act).

339. See, e.g., Byrne, *Special Concern*, *supra* note 21, at 313.

340. Professor Stanley Katz has recently expressed pointed concerns about the loss of focus in university work and tied it to a broader loss in public confidence. Stanley N. Katz, *The Pathbreaking, Fractionalized, Uncertain World of Knowledge*, CHRON. HIGHER EDUC., Sept. 20, 2002, at B7, B9 ("The institutions have, sadly, become too large, arrogant, rapacious, and impersonal for outsiders to understand and sympathize with [T]he institutions are intellectually out of focus and out of control").

B. Revival?

I have argued that the decline in constitutional academic freedom that typified judicial decisions between 1990 and *Grutter* can best be explained by changes in broad social assumptions and in colleges and universities themselves, as well as the concerted actions of some individuals. A revival in institutional academic freedom likely will also require broad changes in society at large and in colleges and universities themselves, but also may depend on actions individuals and small groups may take. In this concluding subsection, I will discuss both briefly.

The "culture wars" seem finished or at least dormant. An astute observer noted:

Today the wars are not exactly over; the situation is more like the Korean armistice—with periodic saber rattling on both sides, but also diplomatic missions across the border, and, most of all, a feeling of exhausted confusion about what all the fuss had originally been about. The combatants are getting old and the issues they fought over have become yesterday's news.³⁴¹

A few firebrands may still fan the flames of indignation, claiming that school policies against harassment create regimes of oppression,³⁴² but most faculty are more concerned with encouraging thoughtful student speech than worrying about rare vicious speech. Curricular changes have slowed, and the integration of large numbers of minority students is an accepted fact. Budget and tuition are larger concerns than canons of authors. Fewer cultural agitators focus more on issues that have less resonance in the broader intellectual culture, such as Islam and internet file swapping.³⁴³ Perhaps *Grutter* itself may foster a new level of normative

341. Andrew Delbanco, *In Memoriam*, N.Y. REV. BOOKS, at 23–24 (Feb. 27, 2003). Professor Marjorie Garber observes that "aesthetic judgment," no longer a discredited occupation of dilettantes, has moved to the center of concern for academic humanists. MARJORIE GARBER, *ACADEMIC INSTINCTS* 48 (2001). "Almost everyone wants to talk about it: a concern with aesthetics and ethics, the reappearance of certain notions of 'value' and 'values' on the literary scene, has preempted the stage, moving critical attention away from a previous decade's concerns with politics and cultural identity." *Id.*

342. See Beth McMurtrie, *War of Words*, CHRON. HIGHER. EDUC., at A31–32 (May 23, 2003) (describing how the Foundation for Individual Rights in Education, headed by Professor Kors, plans to sue numerous state universities for student conduct regulations that may burden student free speech because "the future of America is at stake").

A curious variant is the "Academic Bill of Rights," promoted by David Horowitz. See Sara Hebel, *Patrolling Professors' Politics*, CHRON. HIGHER EDUC., Feb. 13, 2003, at A18–A19. This is a set of principles that colleges and universities should follow in protecting academic freedom, which Horowitz is urging Congress and state legislatures to adopt. *Id.* at A18. Most of the principles are not only unobjectionable, but express the core values of academic freedom, although a few, such as the directive that faculty hiring be conducted with a view to "fostering a plurality of methodologies and perspectives," convert a wholesome consideration into what could become an ideological bat. See *id.* Moreover, it would be perilous to allow legislators to dictate such terms or leave to courts the task of giving them meaning. What should be an academic debate would become a legal and political one, with all that entails of autonomy lost to interest groups. The AAUP has condemned academic bills of rights. AAUP, *ACADEMIC BILL OF RIGHTS*, available at <http://www.aaup.org/statements/SpchState/billofrights.htm> (last visited Oct. 10, 2004).

343. These issues may be very important in themselves. See AAUP Special Committee, *Academic Freedom and National Security in a Time of Crisis*, 89 *ACADEME*, No. 6, 34 (Nov.–

comfort with the basic outlines of the contemporary college or university.

But such conditions give only the opportunity for constitutional academic freedom to gain a secure hold, they by no means ensure it will prevail. The case for academic freedom, for the distinct character of the research institution, must be made better than in the recent past, and may require some changes in practice to remain plausible. An acceptable theory of institutional academic freedom requires an explanation of how scholarship and teaching advance distinct First Amendment values. It also requires an understanding of how academic governance and speech rules, including individual academic freedom, nourish scholarship and teaching. Finally, it requires an understanding of how political interference with the core of academic governance threatens the achievement of the First Amendment goals. I can attempt very little of this here, beyond what I have written already, but I will pose suggestions for future work.

There always is a need in a democratic society to defend the modern college and university philosophically and politically. Historically, college and university presidents have exalted learning, scholarship, and nurturing of tomorrow's leaders in innumerable speeches before all kinds of audiences. However tedious these performances, they kept in rhetorical currency traditional ideals. Such a role seems beyond most contemporary presidents, busy fundraisers and institutional mediators, who seem more concerned with not alienating important constituencies. Interestingly, the most influential defense of affirmative action, an empirical study of the success of minority graduates of selective colleges, was authored by two retired university presidents.³⁴⁴

Faculty, who benefit so handsomely from the structure of modern colleges and universities, need to articulate and live by its ideals. Authors occasionally have risen above boosterism and articulated academic ideals in vital connection with current social concerns. Such work is often critical of the contradictions and absurdities of current institutions. There is nothing lost from criticism of current arrangements, when offered in pursuit of some attractive vision of what works. But such writing often lacks a sense of what matters about colleges and universities. The continued prominence of Newman's *Idea of a University*,³⁴⁵ in addition to its literary merit, stems from its articulation of a coherent ethical sense of higher education long lost in the pluralism of modern intellectual life. By now we have traveled well beyond Clark Kerr's 'multiversity'³⁴⁶ to a sometimes bewildering diversity of inquiries and activities that stretch beyond the inherited meanings of "know" or "learn." We need more serious writing about the values these activities serve and their relative importance.

What such writing should accomplish can be seen in recent books on higher

Dec. 2003); Jeffrey R. Young, *Napster and 6 Colleges Sign Deals to Provide Online Music to Students*, CHRON. HIGHER EDUC., July 30, 2004 at A1.

344. WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER* (1998). Derek Bok has been an outstanding exception to my criticism, as a former president of Harvard who has written thoughtful and constructive accounts of the problems and promise of higher education, as in his recent *UNIVERSITIES IN THE MARKETPLACE: THE COMMERCIALIZATION OF HIGHER EDUCATION* (2003).

345. JOHN HENRY NEWMAN, *THE IDEA OF A UNIVERSITY* (Martin J. Svaglic ed., 1982).

346. CLARK KERR, *THE USES OF THE UNIVERSITY* 1 (1963).

education by Martha Nussbaum³⁴⁷ and Alan Ryan.³⁴⁸ Both authors defend a concept of liberal education in which academic freedom plays an indispensable part. Both authors base their vindications on the contributions such an education makes to citizenship in an open society composed of diverse persons. Their views thus connect with the reasons the Supreme Court has given for the special status of academic freedom and address the most persistent concerns of critics of contemporary higher education.

Nussbaum argues for a vision of liberal education that begins with a commitment to Socratic inquiry and nurtures understanding and respect for those of different ethnic, religious, and sexual identities. Her work is enriched by discussion of exemplary and problematic attempts to accomplish these goals at a variety of undergraduate institutions. For her, the goal of liberal education is the creation of a certain type of "world citizen."

Our country has embarked on an unparalleled experiment, inspired by these ideals of self-command and cultivated humanity. Unlike all other nations, we ask a higher education to contribute a general preparation for citizenship, not just a specialized preparation for a career. To a greater degree than all other nations, we have tried to extend the benefits of this education to all citizens, whatever their class, race, sex, ethnicity, or religion. We hope to draw citizens toward one another by complex mutual understanding and individual self-scrutiny, building a democratic culture that is truly deliberative and reflective, rather than simply the collision of unexamined preferences. And we hope in this way to justify and perpetuate our nation's claim to be a valuable member of the world community of nations that must increasingly learn how to understand, respect, and communicate if our common human problems are to be constructively addressed.³⁴⁹

She defends contemporary humanities teachers against the complaints of cultural conservatives, whom she urges to join hands to oppose the drift toward more strictly vocational higher education.³⁵⁰

Ryan takes an altogether saltier view of the terrain of higher education, but comes out in a similar place. He begins with the question of the role of liberal education in a liberal society that "encourages economic ambition and emphasizes individual choice that espouses the meritocratic route to social mobility and takes for granted the variability of our tastes and allegiances."³⁵¹ While realistically canvassing the magnitude and scope of American higher education, he ends with affirming for all who can profit from it a form of liberal education that would be largely recognizable to his Victorian heroes, John Stuart Mill and Matthew Arnold.

347. See NUSSBAUM, *supra* note 307.

348. See RYAN, *supra* note 311.

349. *Id.* at 294.

350. *Id.* at 298–99. "It would be catastrophic to become a nation of technically competent people. Who have lost the ability to think creatively, to examine themselves, and to respect the humanity and diversity of others." *Id.* at 300. It is striking that such a prolific author would have so little to say about how higher education nurtures scholarship.

351. RYAN, *supra* note 311, at 43.

"[J]ust because the society offers so many incentives to acquire the vocational and practical skills we require, it is all the more important to balance these pressures by disinterested, non-instrumental, and in that sense impractical education."³⁵² Like Nussbaum, Ryan believes that the mix of critical and sympathetic mental and emotional traits acquired in a liberal education can be redemptive for the individual and offer the best promise for nurturing a desirable liberal society.³⁵³

One of the central purposes of education is to overcome the sense of being "thrown" into a meaningless world. Anyone who wants to connect liberalism as a set of cultural and political ambitions with liberal education as a commitment to a humanist and historical understanding of human culture hopes that the second will sustain the first and that the first will provide a proper shelter for the second.³⁵⁴

These contemporary authors unite on the value of liberal education for citizenship, emphasizing its ability to enhance both the critical and sympathetic faculties and thus better equip graduates to deal with the open, diverse world of the future. How helpful is their defense of liberal education for the support of academic freedom? Neither seeks to connect teaching with scholarship. Nussbaum exclusively concerns herself with teaching and curriculum, and Ryan views the "research culture" as "characteristically inimical" to liberal education, research teams resembling more "well-conducted military organizations" than "debating societies."³⁵⁵ Nussbaum also has nothing to say about academic freedom as such, although Ryan does argue helpfully that it is not undermined by non-foundational theories of knowledge.³⁵⁶ They argue for a moral core to contemporary liberal education that can appeal to a broad spectrum of educated citizens. Each argues for a liberal education that educates students to be citizens who articulate justly their own examined values and engage productively with the different perspectives of others. The promise of this for civil society and polity may provide a basis for renewing the "deal" between the academy and the public that Menand argued was struck in the early twentieth century.³⁵⁷

As a lawyer with little claim to philosophical sophistication, I am impressed by the difference between speech in the college and university context and in society at large. Speakers in academia are expected to speak carefully after study and reflection in a manner that invites response from others who similarly care about the topic. Whether in the classroom or in a journal, academic speech aspires to be

352. *Id.* at 91.

353. Ryan appears to be more skeptical about multicultural education than Nussbaum, but the difference may be mostly a matter of tone. Ryan writes:

Any education that makes people less interested in another society's vision of the world has gone badly wrong. . . . Indefensible multiculturalism is not multiculturalism at all but a rearguard attempt to protect cherished beliefs by forbidding one's children, one's ethnic group, or one's co-cultists to discover that there are alternatives to local prejudices.

Id. at 177.

354. *Id.* at 181.

355. *Id.* at 149–51.

356. *Id.* at 154–62.

357. See MENAND, *supra* note 318, at 417.

both serious and communal, seeking to improve the understanding of the topic held by participants. It accomplishes this by setting proficiency standards for who can participate in various discourses, in devoting time and space to discourses its appropriate members deem important, and in regulating the manners of speech of participants while guaranteeing their substantive freedom to engage in the discourse. While this regulatory system may err in particular cases and participants rightfully contest where lines are drawn, it must continue to function if colleges and universities are to continue to produce valuable intellectual goods for society.

In *Urofsky*, Judge Wilkins argued that academic freedom could not be a distinct constitutional right because it would give greater free speech rights to professors than to other citizens.³⁵⁸ What has been said here provides a reply to this familiar concern. Professors' rights of academic freedom exist not for the benefit of the professors themselves but for the good of society; academic freedom is emphatically an instrumental right. Restricting this sphere of speech to professors (and students in proper contexts) makes it feasible to articulate and critique more knowledgeable and complex assertions about the world and persons, in ways not possible on street corners or on television. Indeed, the "barriers to entry" are part of higher education's regulatory structure that itself limits the types of expressions permissible, even by its accredited members.

The supposed paradox of academic freedom is that a First Amendment right can be seen to protect from governmental interference the authority of some public and private actors to regulate the speech of individuals on account of its content. While this peculiarity does invite questions about the reality of academic freedom "on the ground," recognition of the importance of academic freedom raises questions about the libertarian interpretation of the First Amendment that has largely prevailed. Scholars in recent years who have emphasized the capacity of *some* speech regulatory regimes to enhance the value of speech understandably have looked at academic freedom as the epitome of a largely successful regime.³⁵⁹ Preserving an existing, successful speech regime, such as academic freedom, is far easier, both practically and doctrinally, than devising new constitutional rules to

358. *Urofsky v. Gilmore*, 216 F.3d 401, 412 n.13 (4th Cir. 2000) (en banc).

359. Recent scholarship on the First Amendment has begun to explain how private associations that structure speech rules may enhance the overall liberty of citizens. See, e.g., Roderick M. Hills Jr., *The Constitutional Rights of Private Governments*, 78 N.Y.U. L. REV. 144, 175-88 (2003); Julien N. Eule and Jonathan D. Varat, *Transporting First Amendment Norms to the Private Sector: With Every Wish There Comes a Curse*, 45 U.C.L.A. L. REV. 1537, 1623-33 (1998). Professor Hills argues that the institutional autonomy of speech communities enhances individual autonomy by allowing individuals to choose among organizations that embody different values or ends, by allowing them to exercise judgment and authority, and by engaging in speech systems that, while inhibiting them in one direction, permit them to engage in complex speech acts or games that would be impossible without the community. Hills, *supra*, at 178-82, 84-87. He thus usefully isolates values such speech regulators may provide their members. My defense of academic freedom supports his view, as he suggests, but my defense rests on the social value of academic speech rather than on enhancing anyone's individual autonomy, and it insists on the unusual capacity of academic regulation to enhance the truth quality of its members' speech while preserving to them a crucial core or free responsibility for their views. See Eule and Varat, *supra*, at 1627-28.

improve the quality of speech in an existing field, such as television or political campaigns.

Academic speech thus embraces plausibly the truth seeking goal of the First Amendment, associated with Mill.³⁶⁰ Scholarship aims to provide improved accounts of important issues, both through reasoned critique of prevalent work and by new research. Fred Schauer long ago recognized that the truth-seeking rationale for the First Amendment had the greatest plausibility when considering “a select group of individuals trained to think rationally and chosen for that ability.”³⁶¹ He elaborated: “The argument from truth presupposes a process of rational thinking. Indeed, one of its virtues may be that it encourages this process. Yet because the process of rational thinking is the foundation of the theory, the theory weakens or dissolves when the process does not obtain.”³⁶²

What is striking about academic freedom is that it is a system that employs professional standards, peer review, and eligibility criteria to create systems of scholarship and teaching that can advance understanding and challenge error. The rules of discourse evolved by disciplines and methodologies, although themselves ultimately challengeable, provide sophisticated frameworks for intellectual exchange that succeed in part by eliminating voices, perspectives, and questions from particular debates.³⁶³ The point of academic freedom is to keep this structure from non-academic interference, including efforts by federal judges to deregulate individual speech in the name of more libertarian values.

Speech in the wider culture has less claim to advance these ideals of free speech. Although serious discussions of ideas and politics go on outside colleges and universities, they are confined largely to a few high-brow newspapers and magazines, enjoying a love-hate relationship with higher education. So much speech in the “media” is dominated by business interests concerned primarily about profit. More authentic popular speech often either is ignorant of what others have said on a topic or fails to connect with others prepared to respond so as to advance understanding. In short, we lack enough cultural institutions outside of colleges and universities to make most speech fruitful. While there are persuasive arguments for protecting most of such speech, they often rely less on the value of the speech than on concern about the worse effects of censorship.

One need not share the cultural pessimism of my account to accept my basic point—colleges and universities have a distinct approach to speech that deserves

360. JOHN STUART MILL, ON LIBERTY 115–16 (Gertrude Himmelfarb ed. 1985).

361. FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL INQUIRY 26 (1982).

362. *Id.* at 30.

363. Disciplines and methodologies exist as specific attempts to provide criteria for what should be thought true about a certain topic. The value of these different approaches must be debated point by point and do not seem susceptible to any generally validating principles. In Michael Williams's contextual approach to epistemology, new inquiries are possible only when one accepts at least provisionally some framework and presuppositions that have developed around the topic. “[H]ow much unity our methods of inquiry display and how those methods are to be improved are retail questions, not susceptible of wholesale answers derived from our general conception of knowledge and justification.” WILLIAMS, *supra* note 304, at 248. See also Williams, *supra* note 305, at 132 (discussing the theory of knowledge and metaphysics in the context of examination of methods of inquiry).

reasonable deference from society at large. The justification for academic freedom has always relied on the benefits of academic inquiry and teaching for society at large. No other social institutions organize so many trained people and resources to the advancement, understanding, and critique of knowledge. If one accepts that increased knowledge, contemporary interpretations of tradition, and equipping students with the capacity to think critically for themselves are real benefits intimately connected with the ideals of the First Amendment, then some constitutional protection for academic freedom seems appropriate. Such protection must preserve the regulatory structure of higher education, such as the requirements for entry to its protections.

The difficult question remains which aspects of a college's or university's governance rules are so intimately connected to coordinating the speech of its members that those rules deserve constitutional protection from civic displacement. In an earlier article, I attempted to defend a distinction between scholarship and instruction and those important functions of a college or university promoting social mobility, prosperity, and entertainment.³⁶⁴ The former areas correspond to Justice Frankfurter's four freedoms of a university, respecting decisions taken on academic grounds, and presumptively deserve constitutional deference. The latter reflect areas where the modern college or university has become entwined with broader social values and where the society through government can dictate decision making. These areas cannot be considered closed categories but a continuum between core academic concerns about teaching and scholarship with which political power should not interfere and voluntary social tasks undertaken by colleges and universities which could be performed as well by some other social institutions and which are as properly regulated by government as any business entity. For example, a court may not second guess a college's or university's denial of tenure to a professor based upon the disagreement about the intellectual value of her work, but it can find that the college or university violated Title VII by denying her tenure based on the non-academic grounds of race or sex. The task of placing some practice along this continuum and balancing the values implicated by a particular form of government regulation can be performed by the judiciary better than by any other social arbiter.³⁶⁵

It is not surprising that admissions should have become a battleground over what decisions properly may be left to colleges and universities and which should

364. See Byrne, *Special Concern*, *supra* note 21, at 281–83.

365. A recent question of the limits of constitutional academic freedom was raised by the Solomon Amendment, codified at 10 U.S.C. § 983(b) (West Supp. 2004), which requires universities to allow the military to recruit on campus despite its discrimination against homosexuals, violates academic freedom. In *Forum for Institutional and Academic Rights, Inc. v. Rumsfeld*, 291 F. Supp. 2d 269 (D.N.J. 2003), the plaintiffs argued that forcing universities to accept military recruiters despite the schools' policies against sexual orientation discrimination by prospective employees, violated their institutional autonomy, but the court gently but firmly rejected the argument. *Id.* at 302. To me this argument cries, "wolf!" It may well be that Congress has acted unconstitutionally in its irrational and cruel discrimination or that the regulations are in excess of statutory authority, but the claim that the amendment violates academic freedom, when they have nothing to do with teaching, scholarship, or curriculum, but only the way students can be recruited for employment, may weaken claims of constitutional academic freedom when they will need to be made.

be subject to direct political control. Nicholas Lemann made the shrewd comparison between elite universities setting admissions standards and the early nineteenth-century Bank of the United States setting interest rates: both would be perceived as elitist institutions setting the terms for success and advancement in a society dominated by concerns about social mobility and material success.³⁶⁶ Affirmative action could be viewed as an anomaly in an admissions system based solely on neutral “meritocratic” criteria like grades and test scores. *Grutter* declared fair an admissions system that “engages in a highly individualized, holistic review of each applicant’s file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment.”³⁶⁷ Justice Powell was right to this extent, preferences by colleges and universities for admitting under-represented minorities can be viewed as fair only if based on educational grounds and if educational attractiveness for each candidate be viewed in a broader context than tests and grades. The question will be whether approval by the Court will foster a consensus about fairness that will allow persistent social anxieties to find another symbol to engage.

If courts inevitably will be the arbiters of institutional academic freedom, colleges and universities must bestir themselves to present their views cogently before courts. With a few exceptions, colleges and universities have asserted claims of institutional academic freedom either apologetically or not at all.³⁶⁸ *Grutter* elicited several strong amicus curiae briefs arguing for recognition of constitutional academic freedom.³⁶⁹ But such briefs should be filed regularly in appropriate cases in the courts of appeals, especially now that *Grutter* has made so much clearer the doctrinal crux of the argument. Such briefs, of course, must also demonstrate that colleges and universities are acting responsibly and no brief should be filed when an institution fails to do so. Colleges and universities should commit to long-term, coordinated litigation on their academic freedom rights, just as other national interest groups have learned to do.

Such litigation will only be and only deserves to be successful if colleges and universities fulfill the public interest functions they claim. They must nurture the academic freedom of their individual members. They must encourage classrooms that are lively and mutually respectful. They must value learning and the “cultivation of humanity” more than wealth and prestige rankings. There is no single or sufficient formula for living into these academic values. Indeed, they conflict at points with the competition among institutions that has propelled many

366. NICHOLAS LEMANN, *THE BIG TEST: THE SECRET HISTORY OF THE AMERICAN MERITOCRACY* 346–48 (1999).

367. *Grutter v. Bollinger*, 539 U.S. 306, 309 (2003).

368. It is regrettable that no briefs emphasizing institutional academic freedom were filed either in *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), or *Urofsky v. Gilmore*, 216 F.3d 401 (4th Cir. 2000). *Urofsky* is particularly distressing, since the American Civil Liberties Union, representing the plaintiffs, and AAUP, as amicus curiae, argued unsuccessfully for individual rights, but neither the University of Virginia nor any association of universities argued for institutional rights. The court wrongly found that the statute adequately protected institutional interests. *Id.* at 411.

369. See Brief of Amici Curiae Judith Areen, et al., *Grutter* (No. 02-241); Brief of Amici Curiae American Council on Education, et al., *Grutter*, (No. 02-241).

of the creative and vital aspects of higher education. But competition for students, faculty, research grants, contributions, and programs must be tempered by respect for the common values of scholarship. In particular, colleges and universities need to not exploit part-time faculty and graduate assistants, restrain executive salaries, and limit the contagion of revenue-generating sports exhibitions. What seems indispensable to progress is enhanced faculty governance over the core academic issues of curriculum, teaching, and scholarship. As such, the health, dare I say the revival, of the AAUP seems a central step.

CONCLUSION

Colleges and universities have endured for nearly a millennium because the collaboration of scholars enhances their capacity to interpret and extend prior learning. Modern knowledge must be corporately held rather than individually mastered. Colleges and universities also educate the young, teaching sophisticated knowledge and critical abilities that fit them for social leadership. Colleges and universities are a precious resource, and the United States enjoys the largest, most diverse, and energetic institutions in its history. They also constitute the socially approved pathway for meritocratic social mobility. It is not surprising that, in the past fifteen years, they have been such a topic of controversy.

Constitutional academic freedom provides colleges and universities breathing space to make educational and scholarly policy without political interference. The Constitution should do so to the extent that institutions act on legitimate academic grounds without substantially harming a compelling governmental interest. Legitimate academic grounds here means that a policy sincerely and reasonably seeks to enhance the educational and scholarly mission, within the tradition of individual academic freedom that has stood at the core of higher education for many years. The paradox is that colleges and universities that so conduct themselves will seldom need constitutional protection. But when they do, it is imperative that lawyers understand how much is at stake.